APPENDIX

JUL 24 1974

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1316

THE RENEGOTIATION BOARD,

Petitioner,

—v.—

GRUMMAN AIRCRAFT ENGINEERING CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 25, 1974
CERTIORARI GRANTED MAY 28, 1974

IN THE

Supreme Court of the United States

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IN THE SUPREME COURT OF THE UNITED STATES

No. 73-1316

THE RENEGOTIATION BOARD, PETITIONER

v.

GRUMMAN AIRCRAFT ENGINEERING CORPORATION

Appeal From Order of the United States Court of Appeals for the District of Columbia

APPENDIX

RELEVANT DOCKET ENTRIES

1968

June 27—Complaint, appearance Exhibits A, B, C, D, E, F, & G. filed

Aug. 6—Motion of pltf. for summary judgment; c/m 8-6; affidavit of John F. Carr with exhibits 1 thru 8; statement; P&A; exhibits A thru C; M.C. filed

Aug. 26—Opposition of deft. to pltf.'s motion for summary judgment; c/m 8-26. filed

Aug. 26—Motion of deft. to dismiss or in the alternative for summary judgment; affidavit; statement; P&A; c/m 8-26; M.C. filed

RELEVANT DOCKET ENTRIES

1968

Sep. 9—Opposition of pltf. to deft's motion to dismiss; cross-motion for summary judgment; P&A; exhibit; c/m 9-9. filed

Nov. 8—Transcript of proceedings, 10-18-68. Vol. I. pp. 1-41 (reporter: Eva Marie Sanche. Court's copy.) filed

Nov. 4—Order denying pltf's motion for summary judgment and granting deft's motion for summary judgment. (N) Micro 11-7-68 Corcoran, J.

Dec. 5—Notice of appeal by pltf; deposit by Charles W. Colon $5.00; copy mailed to Irwin Goldbloom, Department of Justice. filed

1970

June 30—Motion of deft. for summary judgment; affidavit (3) statement; c/m 6-30-70;

Aug. 6—Motion of pltf. for an order in accordance with the mandate of USCA; P&A; exhibit A; c/m 8-6-70;

Aug. 6—Notice of pltf. to take depositions of Vernon James Dwyer, Geo. H. Vecchietti and Lawrence E. Hartwig; c/m 8-6-70.

Sep. 28—Withdrawal of taking of deposition of George J. Vecchietti and James Dwyer by pltf; c/m 9-28.

Oct. 1—Order denying motion of deft. for protective order as to Chairman Hartwig and holding motion for order in accordance with mandate pending outcome of Chairman Hartwig's deposition (N) Corcoran, J.

Jan. 22—Supplemental memorandum of P & A; by pltf in support of motion for an order in accordance with the mandate of the Court of Appeals; attachments A, B & C; c/m 1-22-71.

Mar. 16—Supplemental P & A of deft in support of motion for summary judgment and in opposition to pltfs' motion for order in accordance with the mandate of the Court of Appeals; attachments (2); c/m filed 3-11-71

RELEVANT DOCKET ENTRIES

1970

Apr. 26—Opinion denying Motion of Deft. for summary judgment and granting motion of Pltf. for order in accordance with mandate Order to be submitted within 10 days. (N) (Reporter—Eva Marie Sanche) J. Corcoran

May 18—Motion of deft for rehearing; affidavit; P & A; c/m 5-18-71; M.C. filed

June 4—Opposition of pltf. to motion for rehearing; P&A; exhibit A; c/m filed 6-4.

June 7—Order in accordance with mandate of U.S.C.A. (N) Corcoran, J.

June 15—Order denying motion of deft. for rehearing (N) Corcoran, J.

July 2—Motion of deft. for stay; no objection

Aug. 5—Notice of appeal by Deft from order of June 7, 1971; copy mailed Schamley

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1595-68

GRUMMAN AIRCRAFT ENGINEERING CORPORATION, Bethpage, Long Island, New York, PLAINTIFF

v.

THE RENEGOTIATION BOARD, DEFENDANT

COMPLAINT

I

This is a civil action to order the production of opinions and records under the Public Information Section of the Administrative Procedure Act, Public Law 90-23, 81 Stat. 54, U.S.C., Title 5, Section 552, Paragraphs 2(A) and (3) of Subsection (a) which provide, in part:

> (2) Each agency, in accordance with published rules, shall make available for public inspection and copying—
>
> > (A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;
>
> (3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, on request for identifiable records made in accordance with published rules stating the time, place, fees to the extent authorized by statute, and procedure to be followed, shall make the records promptly available to any person. . . .

Jurisdiction is conferred on the Court by 5 U.S.C. Section 552(a)(3).

II

Plaintiff is a New York corporation with its principal office in Bethpage, Long Island, New York. Defendant is an agency of the United States of America with its

principal office in the District of Columbia. The opinions and records sought by this action are situated in this judicial district.

First Count

III

By letter dated April 26, 1968, copy attached hereto as Exhibit "(A)," Plaintiff requested that certain final opinions, orders and identifiable records (hereinafter collectively referred to as "opinions") of Defendant be made available by Defendant for inspection and copying.

IV

By letter dated April 30, 1968, copy attached hereto as Exhibit "B," Defendant, by its General Counsel, Howard W. Fensterstock, refused to make available said opinions for inspection and copying by Plaintiff.

V

By letter dated May 7, 1968, Plaintiff requested that Defendant review the General Counsel's refusal to furnish Plaintiff with the opinions referred to in Paragraph III, above.

VI

By letter dated May 21, 1968, copy attached hereto as Exhibit "C," Defendant upheld the action of the General Counsel and thereby refused to make available the opinions requested by Plaintiff as set forth in paragraph III, above. Said refusal constituted final action by Defendant with respect to Plaintiff's request.

VII

The refusal of Defendant to make available said opinions was contrary to and in violation of the requirements of Paragraphs (2)(A) and (3) of Subsection (a) of 5 U.S.C. Section 552. To the extent said refusal is based upon Regulations promulgated by Defendant under 5 U.S.C. Section 552, said Regulations are inconsistent with said statute.

VIII

Plaintiff has been caused and continues to be caused irreparable injury by Defendant's refusal to make available the opinions of Defendant referred to in Paragraph III, above.

Second Count

IX

By letter dated May 7, 1968, copy attached hereto as Exhibit "D," Plaintiff requested that certain identifiable records be made available by Defendant for inspection and copying.

X

By letter dated May 21, 1968, copy attached hereto as Exhibit "E," Defendant, by its General Counsel, Howard W. Fensterstock, refused to make available said records for inspection and copying by Plaintiff.

XI

By letter dated May 28, 1968, copy attached hereto as Exhibit "F," Plaintiff requested that Defendant review the General Counsel's refusal to furnish Plaintiff with the records referred to in Paragraph IX, above.

XII

By letter dated June 13, 1968, copy attached hereto as Exhibit "G," Defendant upheld the action of the General Counsel and thereby refused to make available the records requested by Plaintiff as set forth in Paragraph IX, above. Said refusal constituted final action by Defendant with respect to Plaintiff's request.

XIII

The refusal of Defendant to make available said records was contrary to and in violation of the requirements of Paragraph (3) of Subsection (a) of 5 U.S.C. Section 552. To the extent said refusal is based upon Regulations promulgated by Defendant under 5 U.S.C.

Section 552, said Regulations are inconsistent with said statute.

XIV

Plaintiff has been caused and continues to be caused irreparable injury by Defendant's refusal to make available the records of Defendant referred to in Paragraph IX, above.

WHEREFORE, in accordance with the provisions of paragraphs 2(A) and (3) of Subsection (a) of 5 U.S.C. Section 552, Plaintiff prays that:

(a) Defendant, its agents, employees and representatives be enjoined from withholding said final opinions, orders and identifiable records and be ordered to produce said final opinions, orders and identifiable records for inspection and copying by Plaintiff.

(b) Defendant's Regulations, Title 32, Chapter XIV, Subchapter B, Part 1480, of the Code of Federal Regulations, implementing 5 U.S.C. Section 552, be declared invalid to the extent inconsistent with said statute.

(c) The Court order such other relief as is just and equitable.

GADSBY AND HANNAH

By: /s/
CHARLES W. COLSON
Attorneys for Plaintiff

1700 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 223-9100

EXHIBIT "A"

April 26, 1968

The Renegotiation Board
Washington, D.C. 20446

Attention: Mr. Nathan Bass, Secretary to the Board

Subject: Renegotiation Proceedings
Grumman Aircraft Engineering Corporation
Fiscal Year ended December 31, 1965

Gentlemen:

We are in receipt of your letter of April 15, 1968, advising us that the Renegotiation Board has determined that this company realized excessive profits in the amount of $7,500,000 for the fiscal year ended December 31, 1965.

Because of the Board's adverse determination, it is apparent that we in some way failed to address ourselves in our appearance before the Board division assigned to the case to the important points or matters in this case. At the outset of our presentation before the division on April 8, 1968, we stressed that no specific points for presentation had been designated. Accordingly, we believe that the case has been prejudiced to our detriment by the failure of the Board in its letter of February 9, 1968, to provide us with a Notice of Points for Presentation as required by Sections 1472.4(c) and 1472.5 of the Renegotiation Board Regulations.

We now request that the Board, in order to correct this prejudicial procedural defect, comply with its regulations and provide this company with a Notice of Points for Presentation. Thereupon, we request that we be given the opportunity for another meeting with the Board division assigned to this case pursuant to Section 1472.4(c) of the Board's regulations and that the Board thereafter proceed with this case in compliance with its regulations.

In the event of your denial of the aforementioned request, we should like, in the alternative, to be provided with a summary of the facts and reasons upon which your determination of excessive profits is based pursuant to Sections 1472.4(d) and 1477.3 of the Board's regula-

tions in order to assist us in determining whether or not we will enter into an agreement with the Board. In light of the fact that we have not been given a Notice of Points for Presentation, however, we are not in a position to state that we have submitted all the evidence believed to be relevant to the instant renegotiation proceedings.

As requested by your letter, we enclose herewith a copy of the face sheet of our New York State Franchise Tax Return for such fiscal year together with our computation of the state tax credit applicable to the tentative retained profits.

We also request, as further assistance in enabling us to determine whether to enter into an agreement with the Board, that, in accordance with 5 U.S.C. Section 552, the Renegotiation Board make available for our inspection and copying the final opinions, determinations, unilateral orders, agreements, clearance notices and letters not to proceed issued in the adjudication of renegotiation cases for the renegotiable years 1962 through 1965 involving the following companies:

Douglas Aircraft Company	Martin Marietta Corporation
The Boeing Company	General Dynamics Corporation
Lockheed Aircraft Corporation	McDonnell Company
Ling-Temco-Vought, Inc.	Northrop Corporation
North American Aviation, Inc.	Bell Aerospace Corporation
Fairchild Hiller Corporation	Litton Industries, Inc.
Republic Aviation Corporation	Avco Corporation

In this connection, we also request that we be given access to written summaries of the facts and reasons upon which such final opinions, determinations, unilateral orders and agreements have been reached.

In conclusion, we also request that we be provided with the final vote of each Member of the Board in the instant proceeding.

Very truly yours,

GRUMMAN AIRCRAFT ENGINEERING CORPORATION

JOHN F. CARR
Secretary and General Counsel

JFC:ms

EXHIBIT "B"

THE RENEGOTIATION BOARD
WASHINGTON, D.C. 20446

April 30, 1968

Grumman Aircraft Engineering Corporation
Bethpage
Long Island, New York 11714

Attention: John F. Carr, Esq.
Secretary and General Counsel

Subject: Renegotiation Proceedings
Grumman Aircraft Engineering Corporation
Fiscal Year ended December 31, 1965

Gentlemen:

The Board has received your letter of April 26, 1968, directed to Mr. Nathan Bass, Secretary to the Board, in which you make several requests in connection with the above-entitled renegotiation proceedings. Included in your letter was a request pursuant to the Freedom of Information Act, 5 U.S.C. 552. That portion of your letter containing such request has been referred to me pursuant to section 1480.7(b) of this Board's regulations.

You request that the Board make available to you, for inspection and copying, "the final opinion, determinations, unilateral orders, agreements, clearance notices and letters not to proceed issued in the adjudication of renegotiation cases for the renegotiable years 1962 through 1965 involving the following companies:

Douglas Aircraft Company	Martin Marietta Corporation
The Boeing Company	General Dynamics Corporation
Lockheed Aircraft Corporation	McDonnell Company
Ling-Temco-Vought, Inc.	Northrop Corporation
North American Aviation, Inc.	Bell Aerospace Corporation
Fairchild Hiller Corporation	Litton Industries, Inc.
Republic Aviation Corporation	Avco Corporation

You also request that you be given access to "written summaries of the facts and reasons upon which such

final opinions, determinations, unilateral orders and agreements have been reached."

I have concluded that the records you request are subject to the exemptions set forth in 5 U.S.C. 552(b)(3) and (4), and RBR 1480.9(a)(3) and (4). Further, the Board has specifically determined that records of the type requested in your letter are exempt. RBR 1480.9(b) provides, in part, as follows:

> (b) *Certain records.*—Without limiting the generality of the provisions of paragraph (a) of this section, the following are exempt:
>
> * * * * *
>
> (3) Determinations, unilateral orders, agreements, clearance notices, and letters not to proceed (see Part 1498 of this subchapter).

Your letter also requests that you be provided with the final vote of each member of the Board in the proceeding with your company. This request, too, is denied; the exemptions cited above are also applicable to the voting records of Board members with respect to exempt matters. See RBR 1490.8. Notwithstanding the foregoing, the Board vote in your case will be furnished by separate letter from the Secretary to the Board, but outside the framework of the Freedom of Information Act.

You are hereby advised, pursuant to RBR 1480.7(d), that your request for access to records of the Board, as set forth in your letter of April 26, 1968, is denied. Your attention is directed to the provisions of RBR 1480.7(e), providing for review by the Board of this decision if a written request therefor is made to the Secretary of the Board within 20 days after the date of this letter.

Very truly yours,

/s/ HOWARD W. FENSTERSTOCK
General Counsel

EXHIBIT "C"

THE RENEGOTIATION BOARD
WASHINGTON, D.C. 20446

Registered mail
Return receipt requested

May 21, 1968

Grumman Aircraft Engineering Corporation
Bethpage
Long Island, New York 11714

Attention: John F. Carr, Esq.
Secretary and General Counsel

Subject: Renegotiation Proceedings
Grumman Aircraft Engineering Corporation
Fiscal Year ended December 31, 1965

Gentlemen:

By letter dated May 7, 1968, you protest the action of the General Counsel, in his letter dated April 30, 1968, denying your request for access to certain information under 5 U.S.C. 552.

Pursuant to RBR 1480.7(e), the Board has reviewed the action of the General Counsel.

In the judgment of the Board, the records you have requested are exempt under the provisions of 5 U.S.C. 552(b), particularly paragraphs (3), (4), and (5) thereof. See RBR 1480.9(a). Specifically, certain of such records are within the exemption provided in RBR 1480.9 (b)(3).

The Board accordingly has upheld the action of the General Counsel and has decided that the records re-

quested in your letter will not be made available to you for inspection and copying.

Very truly yours,

/s/ NATHAN BASS
Secretary to the Board

cc: Charles W. Colson, Esq.
Messrs. Gadsby, Maguire & Hannah
Washington, D.C. 20006

EXHIBIT "D"

GRUMMAN AIRCRAFT ENGINEERING CORPORATION
BETHPAGE, LONG ISLAND, NEW YORK 11714

John F. Carr, Secretary and General Counsel

Cable Address: Grumair

May 7, 1968

The Renegotiation Board
1910 K Street, N.W.
Washington, D.C. 20446

Attention: Secretary to the Board, Mr. Nathan Bass

Subject: Renegotiation Proceedings
Grumman Aircraft Engineering Corporation
Fiscal Year ended December 31, 1965

Gentlemen:

Pursuant to 5 U.S.C. Section 552, we request that all of the reports, correspondence, and data contained in or constituting the files of the Eastern Regional Renegotiation Board and of The Renegotiation Board of the United States in connection with the renegotiation of Grumman Aircraft Engineering Corporation for the year 1965 be made available for inspection and copying.

Very truly yours,

GRUMMAN AIRCRAFT ENGINEERING CORPORATION
JOHN F. CARR
Secretary and General Counsel

JFC:c

EXHIBIT "E"

THE RENEGOTIATION BOARD
WASHINGTON, D.C. 20446

Registered mail
Return receipt requested

May 21, 1968

Grumman Aircraft Engineering Corporation
Bethpage
Long Island, New York 11714

Attention: John F. Carr, Esq.
Secretary and General Counsel

Subject: Renegotiation Proceedings
Grumman Aircraft Engineering Corporation
Fiscal Year ended December 31, 1965

Gentlemen:

By letter dated May 7, 1968, you have requested that the Board make available to you, for inspection and copying, pursuant to 5 U.S.C. 552, "all of the reports, correspondence, and data contained in or constituting the files of the Eastern Regional Renegotiation Board and of The Renegotiation Board of the United States in connection with the renegotiation of Grumman Aircraft Engineering Corporation for the year 1965." Pursuant to RBR 1480.7, your request has been referred to me.

RBR 1480.6(b) provides that a person who requests access to an identifiable record must provide a reasonably specific description of the particular record sought, and that the Board will not comply with a request that does not provide a sufficient description or with a general or blanket request.

In my opinion, you have not provided a reasonably specific description of particular records; rather, your request constitutes a general or blanket request for all files of the Board relating to the above-entitled proceeding. Further, I have concluded that the records you request

are, in whole or in part, within the exemptions provided in 5 U.S.C. 552(b), particularly pa. agraphs (2) through (5), and in RBR 1480.9(b).

Your request, therefore, is denied. I call your attention to RBR 1480.7(e), providing for review by the Board of this decision if a written request therefor is made to the Secretary of the Board within 20 days after the date of this letter.

Very truly yours,

/s/ HOWARD W. FENSTERSTOCK
General Counsel

cc: Charles W. Colson, Esq.
Messrs. Gadsby, Maguire & Hannah
Washington, D.C. 20006

EXHIBIT "F"

GRUMMAN AIRCRAFT ENGINEERING CORPORATION
BETHPAGE, LONG ISLAND, NEW YORK 11714

Cable Address: Grumair

The Renegotiation Board
1910 K Street, N.W.
Washington, D.C. 20446

Attention: Secretary to the Board, Mr. Nathan Bass

Subject: Renegotiation Proceedings
Grumman Aircraft Engineering Corporation
Fiscal Year ended December 31, 1965

Gentlemen:

This is to request review by the Board, pursuant to RBR 1480.7(e), of the General Counsel's decision under 5 U.S.C. § 552 communicated to us by letter of May 21, 1968.

The General Counsel states that our request of May 7, 1968, does not provide "a reasonably specific description of particular records . . ." Inasmuch as we have copies of all materials submitted by us to the Board in the instant proceedings and copies of all communications by the Board to us, the documents covered by our request are all other documents in the above-captioned file, including, for instance, reports received by the Board in the normal course of its business from customers of the contractor. In any event, we feel that our request of May 7, 1968, is sufficiently specific to enable employees of the Board to locate and make available for inspection and copying the material in question.

Furthermore, your General Counsel has concluded that the records we have requested "are, in whole or in part, within the exemptions provided in 5 U.S.C. 552(b), particularly paragraphs (2) through (5), and in RBR 1408.9 (b)." Since the records we requested were apparently sufficiently identifiable for him to have come to this conclusion, we are at a loss to comprehend the claim of lack of specificity.

In light of the foregoing, we urge that the documents included in our request to the Board of May 7, 1968, be made available for inspection and copying.

Very truly yours,

GRUMMAN AIRCRAFT ENGINEERING CORPORATION

s/ JOHN F. CARR
Secretary and General Counsel

JFC/eas

EXHIBIT "G."

THE RENEGOTIATION BOARD
WASHINGTON, D.C. 20446

Registered mail
Return receipt requested

June 13, 1968

Grumman Aircraft Engineering Corporation
Bethpage
Long Island, New York 11714

Attention: John F. Carr, Esq.
Secretary and General Counsel

Subject: Renegotiation Proceedings
Grumman Aircraft Engineering Corporation
Fiscal Year ended December 31, 1965

Gentlemen:

Reference is made to your letter dated May 28, 1968, in which you requested a review, pursuant to RBR 1480.7 (e), of the decision of the General Counsel of the Board denying your request that the Board make certain information available to you for inspection and copying, pursuant to the provisions of 5 U.S.C. 552.

This will advise that the Board has upheld the decision of the General Counsel as stated in his letter of May 21, 1968.

Very truly yours,

/s/ NATHAN BASS
Secretary to the Board

cc: Messrs. Gadsby, Maguire & Hannah
Washington, D.C. 20006

• • • •

MOTION FOR SUMMARY JUDGMENT BY PLAINTIFF

Plaintiff moves the court as follows:

1. That it enter, pursuant to Rule 56 of the Federal Rules of Civil Procedure, a summary judgment in plaintiff's favor for the relief demanded in the Complaint on the ground that there is no genuine issue as to any material fact and that plaintiff is entitled to a judgment as a matter of law;

2. If summary judgment is not rendered in plaintiff's favor upon the whole case or for all the relief asked and a trial is necessary, that the court, at the hearing on the motion, by examining the pleadings and the evidence before it and by interrogating counsel, ascertain what material facts are actually and in good faith controverted, and thereupon make an order specifying the facts that appear without substantial controversy and directing such further proceedings in the action as are just. This motion is based upon:

(a) The Complaint with attached Exhibits "A" through "G".

(b) The supporting Affidavit of John F. Carr with attached Exhibits "I" through "VIII" filed herewith.

(c) The Statement of Material Facts As to Which Plaintiff Contends There is no Genuine Issue filed herewith.

(d) The Memorandum of Points and Authorities in Support of Motion for Summary Judgment with attached Exhibits "A" through "C" filed herewith.

GADSBY & HANNAH

By: /s/ CHARLES W. COLSON
Attorneys for Plaintiff

AFFIDAVIT OF JOHN F. CARR

District of Columbia, ss.

John F. Carr, being first duly sworn according to law, on oath deposes and says:

1. He is, and at all times hereinafter mentioned has been, Secretary and General Counsel of Grumman Aircraft Engineering Corporation.

2. As Secretary and General Counsel, deponent had the responsibility on behalf of plaintiff herein for supervising the renegotiation proceedings instituted by defendant herein against plaintiff herein for the fiscal year ended December 31, 1965.

3. During the course of the proceedings referred to in paragraph 2, above, your deponent, as Secretary and General Counsel of plaintiff herein, mailed to the defendant, herein, in the ordinary course of his duties, the letters attached hereto and incorporated herein as Exhibits "I", "IV" and "VI".

4. During the course of the proceedings referred to in paragraph 2, above, your deponent, as Secretary and General Counsel of plaintiff herein, received from the defendant herein, in the ordinary course of his duties, the letters attached hereto and incorporated herein as Exhibits "II", "III", "V", "VII" and "VIII".

Further deponent sayeth nothing.

/s/ JOHN F. CARR

Subscribed and sworn to before me, a Notary Public in and for the District of Columbia, this 6th day of August, 1968.

/s/ BONNIE PREVITE
Notary Public

My Commission expires: June 30, 1972

EXHIBIT "I"

April 26, 1968

The Renegotiation Board
Washington, D.C. 20446

Attention: Mr. Nathan Bass, Secretary to the Board

Subject: ~~Renegotiation Proceedings~~
Grumman Aircraft Engineering Corporation
Fiscal Year ended December 31, 1965

Gentlemen:

We are in receipt of your letter of April 15, 1968, advising us that the Renegotiation Board has determined that this company realized excessive profits in the amount of $7,500,000 for the fiscal year ended December 31, 1965.

Because of the Board's adverse determination, it is apparent that we in some way failed to address ourselves in our appearance before the Board division assigned to the case to the important points or matters in this case. At the outset of our presentation before the division on April 8, 1968, we stressed that no specific points for presentation had been designated. Accordingly, we believe that the case has been prejudiced to our detriment by the failure of the Board in its letter of February 9, 1968, to provide us with a Notice of Points for Presentation as required by Sections 1472.4(c) and 1472.5 of the Renegotiation Board Regulations.

We now request that the Board, in order to correct this prejudicial procedural defect, comply with its regulations and provide this company with a Notice of Points for Presentation. Thereupon, we request that we be given the opportunity for another meeting with the Board division assigned to this case pursuant to Section 1472.4 (c) of the Board's regulations and that the Board thereafter proceed with this case in compliance with its regulations.

In the event of your denial of the aforementioned request, we should like, in the alternative, to be provided with a summary of the facts and reasons upon which

your determination of excessive profits is based pursuant to Sections 1472.4(d) and 1477.3 of the Board's regulations in order to assist us in determining whether or not we will enter into an agreement with the Board. In light of the fact that we have not been given a Notice of Points for Presentation, however, we are not in a position to state that we have submitted all the evidence believed to be relevant to the instant renegotiation proceedings.

As requested by your letter, we enclose herewith a copy of the face sheet of our New York State Franchise Tax Return for such fiscal year together with our computation of the state tax credit applicable to the tentative retained profits.

We also request, as further assistance in enabling us to determine whether to enter into an agreement with the Board, that, in accordance with 5 U.S.C. Section 552, the Renegotiation Board make available for our inspection and copying the final opinions, determinations, unilateral orders, agreements, clearance notices and letters not to proceed issued in the adjudication of renegotiation cases for the renegotiable years 1962 through 1965 involving the following companies:

Douglas Aircraft Company
The Boeing Company
Lockheed Aircraft Corporation
Ling-Temco-Vought, Inc.
North American Aviation, Inc.
Fairchild Hiller Corporation
Republic Aviation Corporation
Martin Marietta Corporation
General Dynamics Corporation
McDonnell Company
Northrop Corporation
Bell Aerospace Corporation
Litton Industries, Inc.
Avco Corporation

In this connection, we also request that we be given access to written summaries of the facts and reasons upon which such final opinions, determinations, unilateral orders and agreements have been reached.

In conclusion, we also request that we be provided with the final vote of each Member of the Board in the instant proceeding.

Very truly yours,

GRUMMAN AIRCRAFT ENGINEERING CORPORATION

/s/ JOHN F. CARR
Secretary and General Counsel

JFC:ms

EXHIBIT "II"

THE RENEGOTIATION BOARD
WASHINGTON, D.C. 20446

April 30, 1968

Grumman Aircraft Engineering Corporation
Bethpage
Long Island, New York 11714

Attention: John F. Carr, Esq.
Secretary and General Counsel

Subject: Renegotiation Proceedings
Grumman Aircraft Engineering Corporation
Fiscal Year ended December 31, 1965

Gentlemen:

The Board has received your letter of April 26, 1968, directed to Mr. Nathan Bass, Secretary of the Board, in which you make several requests in connection with the above-entitled renegotiation proceedings. Included in your letter was a request pursuant to the Freedom of Information Act, 5 U.S.C. 552. That portion of your letter containing such request has been referred to me pursuant to section 1480.7(b) of this Board's regulations.

You request that the Board make available to you, for inspection and copying, "the final opinion, determinations, unilateral orders, agreements, clearance notices and letters not to proceed issued in the adjudication of renegotiation cases for the renegotiable years 1962 through 1965 involving the following companies:

Douglas Aircraft Company	Martin Marietta Corporation
The Boeing Company	General Dynamics Corporation
Lockheed Aircraft Corporation	McDonnell Company
Ling-Temco-Vought, Inc.	Northrop Corporation
North American Aviation, Inc.	Bell Aerospace Corporation
Fairchild Hiller Corporation	Litton Industries, Inc.
Republic Aviation Corporation	Avco Corporation

You also request that you be given access to "written summaries of the facts and reasons upon which such final

opinions, determinations, unilateral orders and agreements have been reached."

I have concluded that the records you request are subject to the exemptions set forth in 5 U.S.C. 552(b)(3) and (4), and RBR 1480.9(a)(3) and (4). Further, the Board has specifically determined that records of the type requested in your letter are exempt. RBR 1480.9 (b) provides, in part, as follows:

> (b) *Certain records.*—Without limiting the generality of the provisions of paragraph (a) of this section, the following are exempt:
>
> * * * *
>
> (3) Determinations, unilateral orders, agreements, clearance notices, and letters not to proceed (see Part 1498 of this subchapter).

Your letter also requests that you be provided with the final vote of each member of the Board in the proceeding with your company. This request, too, is denied; the exemptions cited above are also applicable to the voting records of Board members with respect to exempt matters. See RBR 1490.8. Notwithstanding the foregoing, the Board vote in your case will be furnished by separate letter from the Secretary of the Board, but outside the framework of the Freedom of Information Act.

You are hereby advised, pursuant to RBR 1480.7(d), that your request for access to records of the Board, as set forth in your letter of April 26, 1968, is denied. Your attention is directed to the provisions of RBR 1480.7(e), providing for review by the Board of this decision if a written request therefor is made to the Secretary of the Board within 20 days after the date of this letter.

Very truly yours,

/s/ HOWARD W. FENSTERSTOCK
General Counsel

EXHIBIT "III"

THE RENEGOTIATION BOARD
WASHINGTON, D.C. 20446

~~Registered mail~~
Return receipt requested

May 21, 1968

Grumman Aircraft Engineering Corporation
Bethpage
Long Island, New York 11714

Attention: John F. Carr, Esq.
Secretary and General Counsel

Subject: Renegotiation Proceedings
Grumman Aircraft Engineering Corporation
Fiscal Year ended December 31, 1965

Gentlemen:

By letter dated May 7, 1968, you protest the action of the General Counsel, in his letter dated April 30, 1968, denying your request for access to certain information under 5 U.S.C. 552.

Pursuant to RBR 1480.7(e), the Board has reviewed the action of the General Counsel.

In the judgment of the Board, the records you have requested are exempt under the provisions of 5 U.S.C. 552(b), particularly paragraphs (3), (4), and (5) thereof. See RBR 1480.9(a). Specifically, certain of such records are within the exemption provided in RBR 1480-.9(b)(3).

The Board accordingly has upheld the action of the General Counsel and has decided that the records requested in your letter will not be made available to you for inspection and copying.

Very truly yours,

/s/ NATHAN BASS
Secretary to the Board

cc: Charles W. Colson, Esq.
Messrs. Gadsby, Maguire & Hannah
Washington, D. C. 20006

EXHIBIT "IV"

GRUMMAN AIRCRAFT ENGINEERING CORPORATION
BETHPAGE, LONG ISLAND, NEW YORK 11714

John F. Carr, Secretary and General Counsel

Cable Address: Grumair

May 7, 1968

The Renegotiation Board
1910 K Street, N.W.
Washington, D. C. 20446

Attention: Secretary of the Board, Mr. Nathan Bass

Subject: Renegotiation Proceedings
Grumman Aircraft Engineering Corporation
Fiscal Year ended December 31, 1965

Gentlemen:

Pursuant to 5 U.S.C. Section 552, we request that all of the reports, correspondence, and data contained in or constituting the files of the Eastern Regional Renegotiation Board and of The Renegotiation Board of the United States in connection with the renegotiation of Grumman Aircraft Engineering Corporation for the year 1965 be made available for inspection and copying.

Very truly yours,

GRUMMAN AIRCRAFT ENGINEERING CORPORATION

JOHN F. CARR
Secretary and General Counsel

JFC:c

EXHIBIT "V"

THE RENEGOTIATION BOARD
WASHINGTON, D.C. 20446

Registered mail
Return receipt requested

May 21, 1968

Grumman Aircraft Engineering Corporation
Bethpage
Long Island, New York 11714

Attention: John F. Carr, Esq.
Secretary and General Counsel

Subject: Renegotiation Proceedings
Grumman Aircraft Engineering Corporation
Fiscal Year ended December 31, 1965

Gentlemen:

By letter dated May 7, 1968, you have requested that the Board make available to you, for inspection and copying, pursuant to 5 U.S.C. 552, "all of the reports, correspondence, and data contained in or constituting the files of the Eastern Regional Renegotiation Board and of The Renegotiation Board of the United States in connection with the renegotiation of Grumman Aircraft Engineering Corporation for the year 1965." Pursuant to RBR 1480.7, your request has been referred to me.

RBR 1480.6(b) provides that a person who requests access to an identifiable record must provide a reasonably specific description of the particular record sought, and that the Board will not comply with a request that does not provide a sufficient description or with a general or blanket request.

In my opinion, you have not provided a reasonably specific description of particular records; rather, your request constitutes a general or blanket request for all files of the Board relating to the above-entitled proceeding. Further, I have concluded that the records you

request are, in whole or in part, within the exemptions provided in 5 U.S.C. 552(b), particularly (2) through (5), and in RBR 1480.9(b).

Your request, therefore, is denied. I call your attention to RBR 1480.7(e), providing for review by the Board of this decision if a written request therefor is made to the Secretary of the Board within 20 days after the date of this letter.

Very truly yours,

/s/ HOWARD W. FENSTERSTOCK
General Counsel

cc: Charles W. Colson, Esq.
Messrs. Gadsby, Maguire & Hannah
Washington, D. C. 20006

EXHIBIT "VI"

GRUMMAN AIRCRAFT ENGINEERING CORPORATION
BETHPAGE, LONG ISLAND, NEW YORK 11714

Cable Address: Grumair

May 28, 1968

The Renegotiation Board
1910 K Street, N.W.
Washington, D.C. 20446

Attention: Mr. Nathan Bass, Secretary to the Board

Subject: Renegotiation Proceedings
Grumman Aircraft Engineering Corporation
Fiscal Year Ended December 31, 1965

Gentlemen:

This is to request review by the Board, pursuant to RBR 1480.7(e), of the General Counsel's decision under 5 U.S.C. § 552 communicated to us by letter of May 21, 1968.

The General Counsel states that our request of May 7, 1968, does not provide "a reasonably specific description of particular records . . ." Inasmuch as we have copies of all materials submitted by us to the Board in the instant proceedings and copies of all communications by the Board to us, the documents covered by our request are all other documents in the above-captioned file, including, for instance, reports received by the Board in the normal course of its business from customers of the contractor. In any event, we feel that our request of May 7, 1968, is sufficiently specific to enable employees of the Board to locate and make available for inspection and copying the material in question.

Furthermore, your General Counsel has concluded that the records we have requested "are, in whole or in part, within the exemptions provided in 5 U.S.C. 552(b), particularly paragraphs (2) through (5), and in RBR 1480.9 (b)." Since the records we requested were apparently sufficiently identifiable for him to have come to this con-

clusion, we are at a loss to comprehend the claim of lack of specificity.

In light of the foregoing, we urge that the documents included in our request to the Board of May 7, 1968, be made available for inspection and copying.

Very truly yours,

GRUMMAN AIRCRAFT ENGINEERING CORPORATION

/s/ JOHN F. CARR
Secretary and General Counsel

JFC/eas

EXHIBIT "VII"

THE RENEGOTIATION BOARD
WASHINGTON, D.C. 20446

Registered mail
Return receipt requested

June 13, 1968

Grumman Aircraft Engineering Corporation
Bethpage
Long Island, New York 11714

Attention: John F. Carr, Esq.
Secretary and General Counsel

Subject: Renegotiation Proceedings
Grumman Aircraft Engineering Corporation
Fiscal Year Ended December 31, 1965

Gentlemen:

Reference is made to your letter dated May 28, 1968, in which you requested a review, pursuant to RBR 1480.7 (e), of the decision of the General Counsel of the Board denying your request that the Board make certain information available to you for inspection and copying, pursuant to the provisions of 5 U.S.C. 552.

This will advise that the Board has upheld the decision of the General Counsel as stated in his letter of May 21, 1968.

Very truly yours,

/s/ NATHAN BASS
Secretary to the Board

cc: Messrs. Gadsby, Maguire & Hannah
Washington, D.C. 20006

EXHIBIT "VII"

THE RENEGOTIATION BOARD
1910 K STREET, N.W.
WASHINGTON, D.C. 20446

STATEMENTS OF FACTS AND REASONS

Grumman Aircraft Engineering Corporation
Renegotiation Proceedings

Fiscal Year Ended December 31, 1965

I. DETERMINATION

As a result of renegotiation under the Renegotiation Act of 1951, as amended, The Renegotiation Board has determined that Grumman Aircraft Engineering Corporation ("the contractor") realized excessive profits in the amount of $7,500,000 (subject to appropriate adjustment, if any, for State income taxes) which should be eliminated pursuant to the Act. In eliminating this amount, the contractor will be allowed, under Section 1481 of the Internal Revenue Code of 1954, a credit for Federal income taxes paid on the excessive profits to be eliminated. An order embodying the Board's determination was dated, issued and entered on May 21, 1968.

II. INTRODUCTION

The Eastern Regional Renegotiation Board on October 26, 1967 determined that the contractor realized excessive profits in the amount of $7,500,000 and so notified the contractor. Since the contractor declined to enter into an agreement, the case was reassigned by the statutory Board to itself.

A division of the Board visited the contractor's plants at Bethpage and Peconic, Long Island, in March, and on April 8, 1968 the division met with the contractor. Prior to such meeting, and pursuant to RBR 1472.5, the

contractor was furnished a Notice of Points for Presentation.

By contract types, the contractor's review year renegotiable sales and profits were as follows (000's omitted):

1965	Fixed Price	Fixed Price Incentive	CPFF	CPIF	Total*
	$	$	$	$	$
Sales	202,313	252,788	245,085	113,531	813,717
Profit	21,685	12,509	13,758	4,812	52,764
%	10.7	4.9	5.6	4.2	6.5

* Does not include no-fee facility contract billings of $48,000.

Special Matters

RBR 1477.4(e) provides that if any material issues of law or accounting have been raised in a renegotiation proceeding and have not previously been resolved with the contractor, such issues, and the disposition thereof, will be stated together with the reasons for such disposition.

Allocability of Commercial Research and Development Expense

For a number of years, the contractor has contended that part of its expenses for commercial research and development should be alloacted to renegotiable business under the provisions of RBR 1459.8(e)(2)(ii); the review year expenses in question relate to the development of the Gulfstream II airplane.

On the basis of the evidence available to it, the Board is of the opinion that the Gulfstream was conceived and developed as a commercial venture with, perhaps, vague hopes of some sales to the Government. In fact, the contractor has consistently described the aircraft as a commercial venture and in its 1965 Annual Report to stockholders referred to the Gulfstream II as ". . . the world's fastest, longest-range aircraft designed exclusively for corporate use." Furthermore, as late as August 29, 1967, the contractor in a prospectus continued to classify the Gulfstream planes, both I and II, under the general heading of commercial products.

In view of the foregoing, the Board has refused to allocate any part of the commercial research and development expenses in question to renegotiable business as such costs do not qualify under RBR 1459.8(e)(2)(ii).

III. Statutory Factors

Character of Business

Contractor, for many years, has been a major designer, developer, and manufacturer of military aircraft, principally for the U.S. Navy. In addition, it has, as a prime contractor, had the responsibilities of a weapons system manager. In more recent years, including the review year, it has become a systems manager for aerospace vehicles for the National Aviation and Space Administration.

Navy prime contracts in the review year included:

A-6A Intruder, an all-weather jet attack plane
E-2A Hawkeye, an early warning plane
C-2A, a turboprop transport
S-2E Tracker, carrier-based antisubmarine plane
OV-1 Mohawk STOL, observation and reconnaissance plane

Major prime contracts for space projects included the Orbiting Astronomical Observatory and the Lunar Module for the Apollo moon landing. In addition, the contractor was a major subcontractor to General Dynamics for the F-111 fighter plane.

The major sales categories, which in the review year accounted for 95% of the renegotiable sales, were as follows (000's omitted):

Space (OAO and LM)	$336,970
Navy planes and spares	352,832
F-111 program	87,480
	$777,282

Renegotiable material costs, subcontracting, and items described by the contractor as direct charges, on an input basis, totaled $428,594,000, the equivalent of 64% of

manufacturing cost input as compared to $329,902,000, or 62% in the prior year.

In summary, contractor was a weapons system manager responsible for developing the system and for the successful mating of all components. In its aircraft programs, it generally manufactured the fuselage, the landing gear and airframe, while engines, wheels, brakes, propulsion and navigational equipment were either furnished by the Government or purchased from others. The estimated cost of Government-furnished material, not included in either sales or costs, was $86.3 million.

The majority of the aircraft as well as the spacecraft programs, were continuing, or follow-on from prior years. Also, as in prior years, the contractor continued its efforts to advance the state-of-the-art in its major areas.

The complex nature of the contractor's review year products has been recognized by the Board but the contractor has not been considered as a highly integrated producer.

Extent of Risk Assumed

Approximately 25% of the renegotiable sales were under firm fixed-price contracts, primarily for the OV, A-6A, E-2A, and S-2E planes, all of which represented continuing programs. The A-6A and the E-2A were produced under fixed-price incentive contracts. The fixed-price incentive review year sales, amounting to approximately 31% of renegotiable business, were, except for the F-111, also continuation programs. Although the F-111 program was started in a prior year, it was still in a development stage in the review year. Risk in this program was reduced by a clause (not invoked) in the subcontract under which the prime contractor agreed to reimburse the contractor up to a certain amount if the estimated costs proved to be too low and no follow-on orders were received. The balance of 44% of cost-type contracts carried minimal pricing risks, but did involve considerable technical risks because of the unknowns in the OAO and LM programs and the ever present possibility of termination. In October 1965, the CPFF contract for the LM was converted to a CPIF contract.

In view of the substantial amount of follow-on work and the increasing use of comparatively riskless, cost-type contracts, the Board is of the opinion that contractor experienced no unusual risks in the review year.

Contribution to the Defense Effort

The success of the A-6A in combat areas and the favorable progress of the LM were examples of contribution to the defense effort, even though part of the development may have been accomplishd in years prior to the review period. It is also recognized that some scientific advances from these and other development programs have been made available to other research centers. In the opinion of the Board, the contractor is entitled to moderate consideration under this factor.

Capital Employed

In arguing that its 1965 renegotiable profits were not excessive, the contractor has stressed its increased investment in additional facilities, as related to net income and as compared with the decreasing Government expenditures for facilities; the increasing extent to which short-term and long-term debt was used to finance overall operation; and, the return on allocated, beginning capital employed when compared to the returns in earlier years, after determinations.

The contractor has during its entire corporate existence specialized in defense work for the Government; in its early years, the bulk of its facilities were Government-furnished. In more recent years, the contractor has assumed greater responsibility for capital investments with the result that the increase in debt did impose more risk on the contractor's equity.

The increase in facilities did enable the contractor, with material help from the Government and its vendors, to increase its defense production, bringing with such increase vastly expanded renegotiable profits. The result in the review year was a return on beginning-of-the-year allocated net worth of 81%, a rate which, in the opinion

of the Board, clearly indicates the presence of excessive profits.

Significant Government capital assistance, without which the renegotiable volume of over $800 million could not have been attained, consisted of progress payments at the beginning of the year of approximately $140 million under fixed-price and fixed-price incentive contracts and Government-owned facilities of approximately $61 million. Furthermore, 44% of the review year renegotiable sales were under comparatively riskless, rapid-pay type contracts that put no great financial burden on the contractor.

Efficiency

From the information available to it, including personal observations at the contractor's plants, the Board is satisfied that the contractor's review year operations were conducted in a reasonably efficient manner, due in part to relatively high labor productivity. A low labor turnover rate was experienced. Nevertheless, the Board has received some reports of late deliveries. On balance, in the Board's opinion, the contractor is not entitled to exceptional consideration under RBR 1460.9.

Reasonableness of Costs and Profits

Costs

Although there were some overruns in the review year, on an overal basis it has been concluded that, at best, the contractor can be classified as an average cost producer.

Profits

Review year renegotiable sales were at an all-time high, greatly exceeding the volume in any prior year. They increased substantially over 1964. At the same time renegotiable profits increased at a much faster rate. This is shown by the following table:

	Sales	Profits	%
1965	$813,717	$52,764	6.5
1964	552,732	20,109	3.6
Increment	$260,985	$32,655	12.5

Thus an increase of 47% in sales was accompanied by an increase of 162% in the profits, and the profit margin on the incremental sales far exceeded the overall rate for 1964. Indeed, the profits on the incremental sales exceeded the contractor's total profits in any prior year in its history.

In our opinion, renegotiable profits of nearly $53 million are clearly unreasonable after full credit is given for all favorable factors such as developmental contribution, increased investment in plant, and added risks to equity. Consequently, the margin of profit must be adjusted as provided in RBR 1460.10(b)(3). The Board's determination fully and adequately recognizes the review year efforts of the contractor.

IV. Conclusion

Evaluating the foregoing under the several statutory factors, the Board has determined that the contractor realized excessive profits of $7.5 million during its fiscal year ended December 31, 1965. The effect of the determination is that the contractor will retain renegotiable profits of $45,264,088 on adjusted renegotiable sales of $606,265,029, or 5.6%; and will have adjusted returns of 21.2% and 69.5% on allocated capital employed and net worth, respectively.

/s/ Nathan Bass
Secretary to the Board

• • • •

STATEMENT OF MATERIAL FACTS AS TO WHICH PLAINTIFF CONTENDS THERE IS NO GENUINE ISSUE

Set forth below are the material facts as to which plaintiff contends there is no genuine issue.

1. Plaintiff is a New York City Corporation with its principal offices in Bethpage, Long Island, New York.

2. Defendant is an agency of the United States of America with its principal office in the District of Columbia.

3. By letter dated April 26, 1968, plaintiff requested that defendant make available for inspection and copying, the final opinions, determinations, unilateral orders, agreements, clearance notices and letters not to proceed issued in the adjudication of renegotiation cases for the renegotiable years 1962 through 1965 involving the following companies:

Douglas Aircraft Company
The Boeing Company
Lockheed Aircraft Corporation
Ling-Temco-Vought, Inc.
North American Aviation, Inc.
Fairchild Hiller Corporation
Republic Aviation Corporation
Martin Marietta Corporation
General Dynamics Corporation
McDonnell Company
Northrop Corporation
Bell Aerospace Corporation
Litton Industries, Inc.
Avco Corporation

In this connection, we also request that we be given access to written summaries of the facts and reasons upon which such final opinions, determinations, unilateral orders and agreements have been reached.

4. By letter dated April 30, 1968, defendant, by its General Counsel, Howard W. Fensterstock, refused to make available for inspection and copying by plaintiff the documents specified in paragraph 3, above.

5. By letter dated May 7, 1968, plaintiff requested that defendant review the General Counsel's refusal to furnish plaintiff with the documents specified in paragraph 3, above.

6. By letter dated May 21, 1968, defendant upheld the action of the General Counsel and thereby refused to furnish plaintiff with the documents specified in paragraph 3, above.

7. Said refusal constituted final action by defendant with respect to plaintiff's request.

8. By letter dated May 7, 1968, plaintiff requested that:

> all of the reports, correspondence, and data contained in or constituting the files of the Eastern Regional Renegotiation Board and of The Renegotiation Board of the United States in connection with the renegotiation of Grumman Aircraft Engineering Corporation for the year 1965 be made available for inspection and copying.

9. By letter dated May 21, 1968, defendant, by its General Counsel, Howard W. Fensterstock, refused to make available for inspection and copying by plaintiff the documents specified in paragraph 8, above.

10. By letter dated May 28, 1968, plaintiff requested that defendant review the General Counsel's refusal to furnish plaintiff with the documents specified in paragraph 8, above.

11. By letter dated June 13, 1968, defendant upheld the action of the General Counsel and thereby refused to furnish plaintiff with the documents specified in paragraph 8, above.

12. Said refusal constituted final action by defendant with respect to plaintiff's request.

* * * *

prices charged under the same contracts. This, of course, is acceptable evidence of the voluntary refunds and voluntary price reductions.

11. There are also instances where contractors state it is their general policy to make price reductions in order to maintain a set level of profit on the company's contracts with the Government Defense and Space Agencies.

Opposition to Plaintiff's Motion for Summary Judgment

Comes now the defendant, by its undersigned attorneys, and respectfully opposes plaintiff's Motion for Summary Judgment on the grounds that there is no dispute as to any material facts and defendants are entitled to judgment as a matter of law.

In support of this opposition, the Court is respectfully referred to the defendant's Motion to Dismiss or for Summary Judgment filed concurrently herewith, the Affidavit attached thereto, and the Memorandum of Points and Authorities in Support Thereof.

Respectfully submitted,

Edwin L. Weisl, Jr.
Assistant Attorney General

Harland F. Leathers
Irwin Goldbloom
Attorneys, Department of Justice
Attorneys for Defendants

* * * *

DEFENDANT'S MOTION TO DISMISS OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT

Comes now defendant, by its undersigned attorneys, and respectfully moves the Court, pursuant to Rules 12 and 56, F.R.Civ.P., for a dismissal of the action or for summary judgment on the grounds that there is no genuine issue as to any material fact and defendant is entitled to judgment as a matter of law since the records as to which access is requested are exempt from disclosure under 5 U.S.C. 552(b)(3)(4) and (5).

In support of these motions, the Court is respectfully referred to the Affidavit of Lawrence E. Hartwig, attached hereto, the Statement of Material Facts As to Which There Is No Genuine Issue, and the Memorandum of Points and Authorities filed herewith.

Respectfully submitted,

EDWIN L. WEISL, JR.
Assistant Attorney General

HARLAND F. LEATHERS
IRWIN GOLDBLOOM
Attorneys, Department of Justice
Attorneys for Defendants

• • • •

AFFIDAVIT

LAWRENCE E. HARTWIG, being first duly sworn, on oath deposes and says:

1. I am the Chairman of the Renegotiation Board and as such I am familiar with the files and records of such Board concerning the renegotiation proceedings of the Grumman Aircraft Engineering Corporation for its fiscal year ended December 31, 1965. Such files and records include the records of the Eastern Regional Renegotiation Board.

2. All of the correspondence between the Grumman Aircraft Engineering Corporation (hereinafter sometimes referred to as "Grumman") and the Renegotiation Board with respect to Grumman's request for access to records under 5 U.S.C. 552 is attached to plaintiff's complaint in Civil No. 1595-68 as Exhibits A through G.

3. I have examined the Board's files and records concerning the renegotiation proceedings of Grumman for its fiscal year ended December 31, 1965. The documents contained in such records and files fall into the following four categories:

A. Letters and documents submitted by Grumman to the Renegotiation Board regarding renegotiation proceedings for Grumman's fiscal year ended December 31, 1965, communications from the Renegotiation Board and its personnel to Grumman concerning renegotiation proceedings for Grumman's fiscal year ended December 31, 1965, and inter-agency communications relating to the establishment of a tax credit in connection with the determination of excessive profits for Grumman's fiscal year ended December 31, 1965. Access to the foregoing records is not in dispute. Grumman has specifically indicated that its request did not relate to material submitted by Grumman to the Board or communications from the Board to Grumman. (See Complaint, Ex. F.) The documents in this category are, however, available to Grumman if it desires to examine them.

B. Inter-departmental and inter-agency communications between the Renegotiation Board and other governmental agencies and Departments with respect to the performance by Grumman of its renegotiable business for its fiscal year ended December 31, 1965.

C. Communications between the Renegotiation Board and a customer of Grumman with respect to the performance by Grumman of its renegotiable business for its fiscal year ended December 31, 1965.

D. Intra-agency memoranda and communications consisting of advisory opinions, conclusions, recommendations, deliberations and analyses prepared by personnel and members of the Renegotiation Board in the performance of the decision-making process of the Renegotiation Board in carrying out its duties under the Renegotiation Act of 1951, as amended, with respect to renegotiation proceedings regarding Grumman's fiscal year ended December 31, 1965.

4. By its letter dated April 26, 1968, to the Renegotiation Board (Exhibit A to complaint), Grumman requested that the Board make available "the final opinions, determinations, unilateral orders, agreements, clearance notices and letters not to proceed issued in the adjudication of cases for the renegotiable years 1962 through 1965" of 14 corporations other than Grumman. Such letter also requested access to written summaries of the facts and reasons upon which such final opinions, determinations, unilateral orders and agreements were reached. To the extent such documents are contained in the files of the Renegotiation Board for such 14 corporations, the records contain information relating to income, profits, losses or expenditures of such corporations and the source thereof and may include information relating to trade secrets, processes, operations, and style of work of the various corporations. Such information has always been considered and treated by the Renegotiation Board as confidential information submitted by contractors subject to the Renegotiation Act of 1951, and the Renegotiation Board has always dealt with contractors on

the basis that financial information and information concerning their operations would be treated as confidential. Prior to the recent amendments (June 29, 1967, 32 F.R. 9226) of the Board's regulations governing the Availability and Control of Renegotiation Records and Information which were made in the implementation of the provisions of 5 U.S.C. 552, the regulations of the Renegotiation Board always provided that information and records of the nature described above in this paragraph were regarded and treated as confidential (Renegotiation Board Regulation, Part 1480, as issued March 25, 1952, 17 F.R. 2542, as amended, March 11, 1954, 19 F.R. 1370).

/s/ LAWRENCE E. HARTWIG

Subscribed and sworn to before me, a notary public in and for the District of Columbia, on this 23rd day of August, 1968.

/s/ JULIA S. MASKIE
Notary Public

My commission expires September 30, 1971.

STATEMENT OF MATERIAL FACTS AS TO WHICH DEFENDANT CONTENDS THERE IS NO GENUINE ISSUE

Set forth below are the material facts as to which the defendants contends there is no genuine issue.

1. Plaintiff is the Grumman Aircraft Engineering Corporation. In the course of renegotiation proceedings being conducted by the Renegotiation Board for Grumman's fiscal year ended December 31, 1965, Grumman requested access to records of the Board concerning the final opinions, determinations, unilateral orders, agreements, clearance notices of letters not to proceed issued in the adjudication of renegotiation cases for the renegotiable years 1962 through 1965 involving the following companies:

Douglas Aircraft Company	Martin Marietta Corporation
The Boeing Company	General Dynamics Corporation
Lockheed Aircraft Corporation	McDonnell Company
Ling-Temco-Vought, Inc.	Northrop Corporation
North American Aviation, Inc.	Bell Aerospace Corporation
Fairchild Hiller Corporation	Litton Industries, Inc.
Republic Aviation Corporation	Avco Corporation

This request was contained in a letter to the Board dated April 26, 1968 (Exhibit A to Complaint).

2. Thereafter, by letter of May 7, 1968, Grumman also requested access to:

> all of the reports, correspondence, and data contained in or constituting the files of Eastern Regional Renegotiation Board and of the Renegotiation Board of the United States in connection with the renegotiation for Grumman Aircraft Engineering Corporation for the year 1965 . . . [Exhibit D to Complaint].

3. By its letter of May 28, 1968 (Exhibit F to Complaint), Grumman clarified its request to the Board by stating that its request for access to the Board's files did not relate to materials submitted by Grumman to the Board in connection with the renegotiation proceedings or to materials and communications from the Board to Grumman.

4. By letters dated May 21, 1968, and June 13, 1968 (Exhibits C and G to Complaint), the Renegotiation Board advised plaintiff that its requests for access to records had been denied on the grounds that the records requested are exempt from disclosure under the provisions of 5 U.S.C. 552(b)(3), (4), and (5) and applicable regulations of the Renegotiation Board.

5. The files and records of the Renegotiation Board concerning renegotiation proceedings for Grumman's 1965 fiscal year contain documents which fall into the following categories (Hartwig's Affidavit):

> A. Letters and documents submitted by Grumman to the Renegotiation Board regarding renegotiation proceedings for Grumman's fiscal year ended December 31, 1965, communications from the Renegotiation Board and its personnel to Grumman concerning renegotiation proceedings for Grumman's fiscal year ended December 31, 1965, and inter-agency communications relating to the establishment of a tax credit in connection with the determination of excessive profits for Grumman's fiscal year ended December 31, 1965.

Access to the foregoing documents is not in dispute.

> B. Inter-departmental and inter-agency communications between the Renegotiation Board and other governmental agencies and Departments with respect to the performance by Grumman of its renegotiable business for its fiscal year ended December 31, 1965.
>
> C. Communications between the Renegotiation Board and a customer of Grumman with respect to the performance by Grumman of its renegotiable business for its fiscal year ended December 31, 1965.
>
> D. Intra-agency memoranda and communications consisting of advisory opinions, conclusions, recommendations, deliberations and analyses prepared by personnel and members of the Renegotiation Board in the performance of the decision-making process of the Renegotiation Board in carrying out its duties

under the Renegotiation Act of 1951, as amended, with respect to renegotiation proceedings regarding Grumman's fiscal year ended December 31, 1965.

6. With respect to Grumman's request for documents contained in Renegotiation Board files regarding the 14 other corporations, to the extent such documents are in the files of the Board, the records contain information relating to income, profits, losses or expenditure of such corporations and the source thereof and may include information relating to trade secrets, processes, operations, and style of work of the various corporations (Hartwig Affidavit, para. 4).

Respectfully submitted,

EDWIN L. WEISL, JR.
Assistant Attorney General

HARLAND F. LEATHERS
IRWIN GOLDBLOOM
Attorneys,
Department of Justice
Attorneys for Defendant

ORDER

This matter having come before the Court on plaintiff's motion for summary judgment and defendant's cross-motion for summary judgment, and the Court having considered the pleadings, affidavits and memorandum of points and authorities filed herein, having heard argument of counsel, having found there is no genuine issue of fact to be submitted to the Court and having decided that defendant is entitled to judgment as a matter of law, it is 4th day of November, 1968,

ORDERED AND ADJUDGED that:

Plaintiff's motion for summary judgment be and hereby is denied, and

Defendant's motion for summary judgment be and hereby is granted.

(Signed) HOWARD F. CORCORAN
Judge

NOTICE OF APPEAL

Notice is hereby given that Grumman Aircraft Engineering Corporation, plaintiff above named, hereby appeals to the United States Court of Appeals for the District of Columbia Circuit from the order granting defendant's motion for summary judgment and denying plaintiff's motion for summary judgment entered in this action on the 4th day of November, 1968.
December 5, 1968.

GADSBY AND HANNAH

/s/ CHARLES W. COLSON
Charles W. Colson

and

/s/ TOM M. SCHAUMBERG
Tom M. Schaumberg
1700 Pennsylvania Ave., N.W.
Washington, D. C. 20006
Attorneys for Grumman
Aircraft Engineering
Corporation

GRUMMAN AIRCRAFT ENGINEERING CORPORATION,
APPELLANT

v.

THE RENEGOTIATION BOARD

No. 22635

United States Court of Appeals
District of Columbia Circuit

Argued Oct. 2, 1969

Decided March 10, 1970

* * * *

Before BAZELON, Chief Judge, and WRIGHT and ROBINSON, Circuit Judges.

BAZELON, Chief Judge.

This is an appeal from a summary judgment refusing to order production of documents under the Freedom of Information Act.[1] The issue in the case is the scope of the statutory exemption for confidential information furnished to a federal administrative agency. Appellant, an aerospace contractor, seeks an order compelling the Renegotiation Board to produce (1) the orders and opinions[2] issued during the renegotiation of the contracts of fourteen companies during the years 1962 to 1965,

[1] 5 U.S.C. § 552 (Supp. IV, 1969).

[2] The phrase "orders and opinions" is employed here to encompass the "final opinions, determinations, unilateral orders, agreements, clearance notices and letters not to proceed which appellant requested from the Board. *See* 32 C.F.R. § 1480.8 (1967); 5 U.S.C. § 551(6) (Supp. IV, 1969). In addition to the "Statement of Facts and Reasons" provided by the Board pursuant to 50 App. U.S.C. § 1215(a) (1964), the term "opinion" may also include appellant's request for the "summaries of facts and reasons" on which other "unilateral orders and agreements" are based. As the record now before us does not adequately describe these "summaries," it will be for the District Court on remand to determine whether they have the status of final agency opinions.

and (2) certain documents relating to Grumman's own renegotiation for 1965. The Board contends that the documents are exempt from disclosure because they contain trade secrets and other confidential information. The court below granted the Board's motion for summary judgment, without opinion. We conclude that the statute does not render the documents completely immune from disclosure. Accordingly, we reverse the District Court's judgment and remand for further proceedings to determine which documents (or parts thereof) are available to appellant under the Act.

I.

[1] The Board has always regarded its opinions and orders as confidential and therefore not subject to release under section 3 of the Administrative Procedure Act.[3] The authority for such a blanket denial of access to orders and opinions was removed by the Freedom of Information Act, which took effect on July 4, 1967. Government agencies are now required to make available to the public their "final opinions, including concurring and dissenting opinions, as well as orders." [4]

[2-5] The Board contends, however, that the opinions and orders in question are exempted from the Act's broad disclosure requirements because they include data submitted "in confidence" to the Board by defense contractors. The Board's argument is grounded in the statutory ex-

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[3] The Board's operations are excluded from the requirements of all parts of the APA except section 3. 50 App. U.S.C. § 1221 (1964). Section 3 formerly permitted nondisclosure of orders and opinions which were "required for good cause to be held confidential." 5 U.S.C. § 1002(b) (1964). The Board imparted secrecy to all its orders and opinions by employing the presumption that, as a matter of law, they *all* came within this exception. 32 C.F.R. § 1480.8 (1967); 17 Fed. Reg. 2542 (1952).

[4] 5 U.S.C. § 552(a) (2) (A) (Supp. IV, 1969). *Cf.* 32 C.F.R. § 1480.5 (1969). The reason for requiring concurring and dissenting, as well as majority, opinions to be made public was that "five agencies—including * * * the Renegotiation Board—do not make public the minority views of their members," although the public is entitled to know the opinions of all agency members. H.R. Rep. No. 1497, 89th Cong., 2d Sess. 8 (1966).

emption for "(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential." [5] This provision was designed to prevent the unwarranted invasions of personal privacy which might be caused by the Government's discriminate release of confidential information.[6] The statutory history does not indicate, however, that Congress intended to exempt an entire document merely because it contained some confidential information.[7] On the contrary, should data which falls within Exemption (4) appear in any Board opinion or order,[8] both the Act and the Board's regula-

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[5] 5 U.S.C. § 552(b) (4) (Supp. IV, 1969). *Cf.* 32 C.F.R. §1480.9 (4) (1969). The Board also cites another statutory exemption which covers matters that are "(3) specifically exempted from disclosure by statute." 5 U.S.C. § 552(b)(3) (Supp. IV, 1969). Appellee argues that its opinions and orders are brought within this exemption by 18 U.S.C. § 1905 (1964), which punishes public officials who divulge "in any manner or to any extent not authorized by law" information submitted to them by any person on his trade secrets, income and the like. Unlike other statutes which specifically define the range of disclosable information, *e. g.* 26 U.S.C. § 6103 (1964), as amended (Supp. IV, 1969), section 1905 merely creates a criminal sanction for the release of "confidential information." Since this type of information is already protected from disclosure under the Act by § 552(b) (4), section 1905 should not be read to expand this exemption, especially because the Act requires that exemptions be narrowly construed. 5 U.S.C. § 552(c) (Supp. IV, 1969).

[6] S. Rep No. 813, 89th Cong., 1st Sess. 9 (1965).

[7] *Id.* at 7; H.R. Rep. No. 1497, *supra* note 4, at 8.

[8] The "deletion" provision of the Act refers to "opinions" but not to "orders," because it apparently contemplates that "orders" are merely summary statements of agencies' final adjudicative action and are accompanied by "opinions" setting forth the agencies' principles and reasoning. See Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act 18 (1967). The renegotiation process clearly does not fit this pattern, since 90% of the Board's determinations are by order without opinion. In order to achieve the statutory purpose of disclosing agency action while concealing personal identity, the Board must be allowed to delete identifying details from its orders. Moreover, this protects the Congressional determination that there be two methods of renegotiation, voluntary "agreements" (orders) and unilateral Board determinations (orders with opinions), by giving the same anonymity to all orders as is given to opinions.

tions[9] recognize that the interests of confidentiality can be protected by striking identifying details prior to releasing the document.[10] The District Court's judgment, permitting appellee to deny the public all access to its orders and opinions, must therefore be reversed and the cause remanded to allow appellant access to the orders and opinions requested after appellee has made suitable deletions.

[6] A request for the orders and opinions concerning a single contractor would clearly create a problem of confidentiality. In the present case this problem does not exist because appellant has requested orders and opinions relating to fourteen contractors, and their release en masse without identifying details will preserve anonymity. In the future, the Board can avoid the problem by deleting identifying details from each opinion or order and then making it available to public inspection as a matter of course.[11] This procedure will fulfill the statutory mandate by exposing to public scrutiny the agency's discharge of its functions while protecting the privacy of the persons involved in the disposition of individual cases.[12]

II.

In addition to the orders and opinions, appellant also requested the Board to release "the reports, correspond-

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[9] 5 U.S.C. § 552(a) (2) (Supp. IV, 1969); 32 C.F.R. § 1480.5(c) (1969).

[10] The Act requires that "the justification for the deletion shall be explained fully in writing." 5 U.S.C. § 552(a) (2) (Supp. IV, 1969). *Cf.* 32 C.F.R. § 1480.5(c) (2) (1969).

[11] To preserve the anonymity of its records, the Board may, of course, refer to them by date or other code number in the index to its members' votes and opinions. 5 U.S.C. § 552(a) (2) (Supp. IV, 1969); 32 C.F.R. § 1480.5(d) (1969). A system of numerical identifications has previously been used to report on the Board's operations. See Comptroller General's Report on Coordination Between the Renegotiation Board and the Defense Department, BNA Fed. Contracts Rep. No. 232 at D-1 (July 29, 1968).

[12] *See* H.R. Rep. No. 1497, *supra* note 4, at 8; S. Rep. No. 813, *supra* note 6, at 7.

ence and data" in connection with Grumman's renegotiations for 1965. There is no suggestion that these are not "identifiable records" within the meaning of § 552 (a)(3). In fact, the Chairman of the Renegotiation Board inspected the material in question and divided it into four categories:

> A. Letters and documents exchanged by Grumman and the Board;
>
> B. Inter-departmental and inter-agency communications between the Board and other government agencies with respect to Grumman's performance on its renegotiable contracts;
>
> C. Communications between the Board and a firm holding a renegotiable contract, concerning Grumman's performance as a subcontractor; and
>
> D. Intra-agency memoranda and communications consisting of advisory opinions, conclusions, recommendations, and analyses prepared by personnel and members of the Board.[13]

The parties agreee that the documents in category (A) are available for inspection; appellant also states that it does not seek access to the advisory memoranda encompassed by category (D). Thus the parties appear in an adversary posture only as to the "performance reports" in categories (B) and (C).

[7-8] Congress intended that § 522 would make available to the general public any agency records "which would routinely be disclosed to a private party through the discovery process in litigation with the agency." [14]

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[13] Appellant suggested that there might be a fifth category of documents, "investigatory or other factual reports prepared by Board employees," but appellee assured this court that any such items are included in categories (B) and (C).

[14] H.R. Rep. No. 1497, *supra* note 4, at 10. Documents are available "if a court would 'routinely' order them produced in discovery proceedings," even though the agency might oppose production. Benson v. GSA, 289 F.Supp. 590, 595 (W.D. Wash. 1968), aff'd *sub nom.* GSA v. Benson, 415 F.2d 878 (9th Cir. 1969). While adopting "discovery" criteria as a gauge for availability, the Act removed the requirement that a party show "need" for a document; information

In Boeing Airplane Co. v. Coggeshall,[15] we held that the Board's investigatory and other factual reports were subject to discovery. Hence, the documents being sought by appellant are clearly available to it under the Act unless they are exempted by subsection (b).

[9-11] The Board contends that such immunity from disclosure is provided by Exemption (4)'s protection of confidential commercial and financial information. This provision has been interpreted to encompass only information received from persons outside the Government.[16] We concur in this reading of the statute.[17] The plain language of the exemption—it applies only to "information obtained from any *person*" [18]—is reenforced by the statutory history, which indicates that the exemption was not meant to allow agencies to render documents "confidential" by passing them back and forth among themselves.[19] On the other hand, information which is confidential in the hands of one agency retains its protected character in the hands of agencies to which it is subsequently furnished.[20] On remand, the District Court will have to determine, through *in camera* inspection,[21] whether the

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is available equally "to any person." *See* Davis, The Information Act: A Preliminary Analysis, 34 U. Chi. L. Rev. 761, 765-66 (1967).

[15] 108 U.S. App. D.C. 106, 280 F.2d 654 (1960).

[16] Benson v. GSA, *supra* note 14, 289 F. Supp. at 594; Consumers Union of United States, Inc. v. Veterans Admin., 301 F. Supp. 796, 803 (S.D.N.Y. 1969). *Cf.* Davis, *supra* note 14, at 787-92.

[17] *Cf.* Boeing, *supra* note 15, 108 U.S. App. D.C. at 113, 280 F.2d at 661.

[18] The APA excludes government agencies from its definition of "persons." 5 U.S.C. § 551(2) (Supp. IV, 1969).

[19] S. Rep. No. 813, *supra* note 6, at 9; H.R. Rep. No. 1497, *supra* note 4, at 10.

[20] For example, the Board is empowered to inspect income tax returns, and its regulations require that data derived from that source not be revealed. 32 C.F.R. § 1480.2(c) (1969).

[21] *See* Ackerly v. Ley, 137 U.S. App. D.C. 133, 420 F.2d 1336 (1969); GSA v. Benson, *supra* note 14.

inter-departmental communications involved in this case come within this narrow category.[22]

[12] This analysis does not apply, however, to the reports submitted by the prime contractor on Grumman's performance, since that material originated outside the Government. After examining those documents, the District Court must decide whether they contain commercial or financial information which the contractor would not reveal to the public and therefore are exempt from disclosure or are subject to release only after appropriate deletions have been made.

Reversed and remanded.

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[22] The Board initially also relied on 5 U.S.C. § 552(b) (5) (Supp. IV, 1969) which protects agencies' internal policy memoranda, but it has since abandoned that contention.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil No. 1595-68

GRUMMAN AIRCRAFT ENGINEERING CORPORATION,
PLAINTIFF

v.

THE RENEGOTIATION BOARD, DEFENDANT

MOTION FOR SUMMARY JUDGMENT

Defendant, The Renegotiation Board, by its undersigned attorneys, respectfully moves for summary judgment pursuant to Rule 56(b) F.R.Civ.P. on the ground that there are no genuine issues as to material facts and defendant is entitled to judgment as a matter of law.

In accordance with the Judgment and Opinion of the Court of Appeals in this cause entered on March 10, 1970, defendant seeks a judgment determining that:

1. The documents in the files of The Renegotiation Board relating to the performance by the plaintiff of its Government contracts are not public documents and therefore are exempt from disclosure under 5 U.S.C. 552(b)(3), (4); and

2. The "Summary of Facts and Reasons" relating to one of the fourteen corporations as to which plaintiff seeks documents reflecting Renegotiation Board action is not a "final opinion" within the meaning of 5 U.S.C. 552(a)(2).

In support of this motion, the Court is respectfully referred to:

(A) The Affidavit of Vernon James Dwyer, Deputy Director Procurement Policy, Office of the Secretary of Defense; and

(B) The Affidavit of George Joseph Vecchietti, Deputy Assistant Administrator for Industry Affairs, National Aeronautics and Space Administration; and

(C) A group of documents submitted herewith to the Court only under seal for *in camera* examination. A description of these documents is as follows:

1. Report dated September 20, 1966, of General Dynamics Corporation, Fort Worth Division, together with Eastern Regional Renegotiation Board's (hereinafter "ERRB") letter of inquiry, dated August 17, 1966.
2. A letter dated January 15, 1968, from the Board to Naval Air Systems Command Headquarters, and the latter's reply dated January 26, 1968.
3. ERRB's letter request dated June 16, 1967, to Naval Plant Representative at Grumman's Plant and the Defense Contract Audit Agency's report dated May 7, 1967.
4. ERRB's letter dated August 17, 1966, to Naval Plant Representative at Grumman's plant and the Navy's report dated September 12, 1966.
5. Naval Air Systems Command letter dated September 23, 1966, enclosing a report on Grumman's performance.
6. ERRB's request dated August 17, 1966, to National Aeronautics and Space Administration ("NASA") and NASA's letter of September 16, 1966, enclosing (1) a report dated September 14, 1966; and (2) a report dated September 12, 1966.
7. NASA's letter dated September 29, 1966, enclosing report for Goddard Space Flight Center.
8. Naval Air Systems Command letter dated October 12, 1966, attaching report.
9. ERRB's August 17, 1966, request and Department of the Army's Performance Report dated September 28, 1966.
10. A group of Contractor Performance Evaluation Reports prepared by the Department of Defense and NASA bearing the following designations:

a. DDC-CP0024-03

b. DDC-CP0024-05

c. DDC-CP0079-01

d. DDC-CP0024-04

e. CPP-660509

f. DDC-CPP681239

g. CPT671202

h. DDC-CPP680811

(D) A copy of a Summary of Facts and Reasons issued by the Renegotiation Board with respect to a defense contractor on April 9, 1968. Also, a copy of said Summary of Facts and Reasons with proposed deletions.

(E) An Affidavit of Lawrence E. Hartwig, Chairman of The Renegotiation Board.

In further support of this Motion for Summary Judgment the Court is respectfully referred to the Memorandum of Points and Authorities filed herewith.

Respectfully submitted,

WILLIAM D. RUCKELSHAUS
Assistant Attorney General

HARLAND F. LEATHERS

IRWIN GOLDBLOOM
Attorneys, Department of Justice

Attorneys for Defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1595-68

GRUMMAN AIRCRAFT ENGINEERING CORPORATION,
PLAINTIFF

v.

THE RENEGOTIATION BOARD, DEFENDANT

AFFIDAVIT

VERNON JAMES DWYER after first being duly sworn, deposes and says:

1. I am Vernon James Dwyer, Deputy Director Procurement Policy, Office of the Secretary of Defense.

2. Subsequent to the decision of the United States Court of Appeals for the District of Columbia Circuit in *Grumman Aircraft Engineering Corporation* v. *The Renegotiation Board*, No. 22,635, Performance Reports, Contractor Performance Evaluation Reports and other documents relating to the performance of its Government contracts by Grumman Aircraft Engineering Corporation were examined and reviewed by me on behalf of the Department of Defense. These documents, which relate to the performanc by Grumman of its government contracts subject to renegotiation during Grumman's fiscal year ended December 31, 1965, were prepared by personnel in this Department and furnished to the Renegotiation Board at the Board's request.

3. The information contained in the above-referenced documents consists almost entirely of commercial and financial data and was largely obtained from Grumman Aircraft Engineering Corporation by the Defense Department in the course of its administration of government contracts with Grumman. In addition, in one instance such reports contain information relating to a government contractor other than Grumman and such information was obtained by personnel of the Defense

Department in the course of governmental administration of that contractor's government contracts.

4. The information which is contained in the above-referenced documents relating to Grumman and another contractor is not released to the public since such information is of a type regularly received in confidence in connection with the administration of government contracts and not ordinarily made public by the contractor. Therefore, such information is confidential under the provisions of 18 U.S.C. 1905 and 5 U.S.C. 552(b)(4). Except for the information relating to a contractor other than Grumman, this Department considers the information properly releasable to Grumman and would release it to Grumman upon Grumman's request, but would not release it outside the Government to any one other than Grumman.

/s/ Vernon James Dwyer
VERNON JAMES DWYER

Subscribed and sworn to before me this 5th day of May 1970.

/s/ [Illegible]
Notary Public

My commission expires July 31, 1973.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1595-68

GRUMMAN AIRCRAFT ENGINEERING CORPORATION,
PLAINTIFF

v.

THE RENEGOTIATION BOARD, DEFENDANT

AFFIDAVIT

GEORGE JOSEPH VECCHIETTI after first being duly sworn, deposes and says:

1. I am George Joseph Vecchietti, Deputy Assistant Administrator for Industry Affairs, National Aeronautics and Space Administration.

2. Subsequent to the decision of the United States Court of Appeals for the District of Columbia Circuit in *Grumman Aircraft Engineering Corporation* v. *The Renegotiation Board*, No. 22,635, three Renegotiation Performance Reports and two Contractor Performance Evaluation Reports were examined and reviewed by me on behalf of the National Aeronautics and Space Administration. These documents, which relate to the performance by Grumman of its government contracts subject to renegotiation during Grumman's fiscal year ended December 31, 1965, were prepared by personnel in this Agency and furnished to the Renegotiation Board at the Board's request.

3. The information contained in the above-referenced documents consists almost entirely of commercial and financial data and was largely obtained from Grumman Aircraft Engineering Corporation by the National Aeronautics and Space Administration in the course of its administration of government contracts with Grumman. In addition, in one instance such reports contain information relating to government subcontractors which might

be considered to reveal information that is confidential to those subcontractors. Such information appears in Paragraph 14 (p. 6) of the Renegotiation Performance Report on Contract NAS5-814.

4. The information which is contained in the above-referenced documents relating to Grumman and other subcontractors is considered not to be releasable to the public because such information is of a type regularly received in confidence in connection with the administration of government contracts and not ordinarily made public by the contractor. Therefore, such information is considered to be confidential under the provisions of 18 U.S.C. 1905 and 5 U.S.C. 552(b)(4). Except for the information identified above relating to government subcontractors, this Agency considers the information to be properly releasable to Grumman, but does not consider it releasable outside the Government to anyone other than Grumman.

/s/ George J. Vecchietti
GEORGE J. VECCHIETTI

Subscribed and sworn to before me this 13th day of May 1970.

/s/ Margaret F. Nelson
MARGARET F. NELSON
Notary Public

My Commission Expires February 14, 1972.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1595-68

GRUMMAN AIRCRAFT ENGINEERING CORPORATION,
PLAINTIFF

v.

THE RENEGOTIATION BOARD, DEFENDANT

CITY OF WASHINGTON)
) SS
DISTRICT OF COLUMBIA)

AFFIDAVIT

LAWRENCE E. HARTWIG, being duly sworn, deposes and says:

1. I am the Chairman of The Renegotiation Board, the defendant in the above-entitled action. I make this affidavit in support of the position of the Board that Summaries of Facts and Reasons are not "final opinions" of the Board within the meaning of 5 U.S.C. 552(a)(2)(A).

2. A Summary of Facts and Reasons is to be distinguished from a Statement of Facts and Reasons. A Statement is furnished, upon request, pursuant to the requirements of Sections 105(a) of the Renegotiation Act of 1951, which provides in part as follows:

> * * * Whenever the Board makes a determination with respect to the amount of excessive profits, and such determination is made by order, it shall, at the request of the contractor or subcontractor, as the case may be, prepare and furnish such contractor or subcontractor with a statement of such determination, of the facts used as a basis therefor, and of its reason for such determination.

A Summary, on the other hand, is not a statutory document; the Act does not require the Board to furnish it. It is given, upon request, pursuant to a regulation promulgated by the Board in furtherance of the direction in the Act (sec. 105(a)) that the Board "shall endeavor to make an agreement with the contractor or subcontractor with respect to the elimination of excessive profits." The stated, and sole, purpose of the Board in providing the contractor with a Summary is "to assist the contractor in determining whether or not it will enter into an agreement" (RBR 1477.3). A Summary is available to the contractor not only at the Board level, but also at the regional board level; and a Summary issued by a regional board may be superseded by one issued by the Board after its review of the case. Thus, in a given case, there may be two separate Summaries which have different analyses and come to different conclusions. Whereas a Statement is furnished only in conjunction with a determination made by order, a Summary is available to the contractor in any case, whether the determination is subsequently embodied in an order or in an agreement.

3. If a contractor declines to enter into an agreement, the Act, in section 105(a), requires the Board to "issue and enter an order determining the amount" of excessive profits. Unless thereafter, within the time provided, the contractor files a petition with the United States Tax Court for a redetermination, such order is "final and conclusive and * * * not * * * subject to review or redetermination by any court or agency." It is only after the issuance of such an order that the contractor may request and obtain a Statement. The Statement, like the order, is final. If the contractor wishes to contest the order, because he believes that the Statement contains either an error of fact or an improper evaluation of his case, or for any other reason, his only recourse is to petition the Tax Court for a redetermination.

4. A Summary, unlike a Statement, is not a final exposition of the Board's view of the case. It is furnished, not after a final order has been issued, but in the course

of a renegotiation proceeding. It is given after the case has been fully discussed at a meeting or meetings between the contractor and Board representatives, and it may or may not include all the views expressed at such meetings. It is intended as an aid in the effort to reach agreement with the contractor. In the nature of things, since the case is still open, the Summary is subject to change; it is not a final opinion. It is issued after a determination is made, but before the determination is embodied in an order or agreement. If, during that interval, the Board discovers or the contractor points out that an error has been made, or that a material point has been overlooked, the determination is modified accordingly. A Statement, if thereafter issued in such a case, would reflect the change or correction so made and thus would necessarily differ from the Summary previously furnished.

5. Changes or corrections of the type described in the preceding paragraph have in fact occurred. For example, the Board determined excessive profits of $175,000 in the case of a contractor engaged in the development and production of advanced electronic systems and equipment. A summary was furnished to the contractor. Among other things, it stated that the contractor's performance of a major subcontract in the fiscal year under review involved little risk because of the prior experience of the contractor in making a similiar product. The contractor subsequently supplied convincing evidence that its earlier product was substantially different from that manufactured and sold in the review year. The Board thereupon undertook a reevaluation of the case and concluded that the contractor was entitled to additional credit under the statutory factors of extent of risk assumed and contribution to the defense effort. As a result, the Board reduced its determination of excessive profits to $150,000. The contractor accepted the revised determination and entered into a refund agreement.

6. In another case, involving the renegotiation of the plaintiff in this action for an earlier fiscal year, the Board determined excessive profits in the amount of $4 million. A Summary was furnished upon request of

the contractor. Thereafter, it developed that the contractor had made a price reduction in the amount of $430,550, applicable to deliveries and billings made in the year under review. The Board accordingly made a direct accounting adjustment in the same amount, which reduced the determination of excessive profits to $3,569,450. Notwithstanding this modification, the contractor declined to enter into an agreement and an order was issued.

/s/ Lawrence E. Hartwig
LAWRENCE E. HARTWIG

Subscribed and sworn to before me, a notary public in and for the District of Columbia, on this 23rd day of June, 1970.

/s/ Helen V. Allen
HELEN V. ALLEN

My Commission Expires May 14, 1974.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1595-68

GRUMMAN AIRCRAFT ENGINEERING CORPORATION,
PLAINTIFF

v.

THE RENEGOTIATION BOARD, DEFENDANT

MOTION FOR AN ORDER IN ACCORDANCE WITH THE MANDATE OF THE COURT OF APPEALS GRANTING ACCESS TO OPINIONS AND TO INVESTIGATORY OR OTHER FACTUAL REPORTS PREPARED BY BOARD EMPLOYEES

Plaintiff, Grumman Aircraft Engineering Corporation, respectfully moves this Court to enter an order granting plaintiff access to, for the purpose of inspection and copying, defendant's (a) opinions relating to fourteen named corporations for the years 1962 through 1965 and (b) investigatory or other factual reports prepared by Board employees relating to the renegotiation of plaintiff for the year 1965 not heretofore made available in accordance with the Mandate of the Court of Appeals entered on March 10, 1970.

Inasmuch as plaintiff has never been given access to defendants' files relating to plaintiff or to said fourteen corporations, plaintiff cannot specifically identify all such factual reports and opinions and therefore requests that the Court make *in camera* inspection of each such file.

Included in this motion by way of example but not by way of limitation are:

(1) Any reports of "personal observations" (Joint. App. at 36) made by Board employees on visits to plaintiff's plants.

(2) Any "Statement of Facts and Reasons" furnished pursuant to Renegotiation Board Regulation

("RBR") 1477.2 (32 CFR 1477.2) and Section 105(a) of the Renegotiation Act of 1951 (50 U.S.C. App. § 1215(a)).

(3) Any "Summary of Facts and Reasons" prepared pursuant to RBR 1477.3 (32 CFR 1477.3) when no "Statement of Facts and Reasons" was subsequently furnished.

(4) Any "report" prepared by a Regional Board pursuant to RBR 1473.2(a) (32 CFR 1473.2(a)) which results in a clearance.

(5) Any "report" prepared by a Regional Board pursuant to RBR 1475.3 (32 CFR 1475.3) which does not result in a clearance and when no "Statement of Facts and Reasons" or "Summary of Facts and Reasons" was subsequently furnished.

(6) Any "recommendation" prepared by a division of The Renegotiation Board pursuant to RBR 1472.4 (d) (32 CFR 1472.4(d)) which results in a clearance.

(7) Any "recommendation" prepared by a division of The Renegotiation Board pursuant to RBR 1472.4 (d) (32 CFR 1472.4(d)) which does not result in a clearance and when no "Statement of Facts and Reasons" or "Summary of Facts and Reasons" was subsequently furnished.

(8) Any opinion rendered in a Class B case which results in a clearance pursuant to RBR 1473.2 (b) (32 CFR 1473.2(b)).

(9) Any opinion rendered in a Class B case pursuant to RBR 1472.3 (32 CFR 1472.3) which does not result in a clearance and when no "Statement of Facts and Reasons" or "Summary of Facts and Reasons" was subsequently furnished.

(10) Any transcript, minutes or memoranda of meetings of defendant or any panel or division thereof reflecting (a) any of the above or (b) any other opinion of defendant.

In support of this Motion, the Court is respectfully referred to the Memorandum of Points and Authorities filed herewith.

Respectfully submitted,

/s/ Tom M. Schaumberg
TOM M. SCHAUMBERG

/s/ Rexford T. Brown
REXFORD T. BROWN

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1595-68

[Filed Oct. 1, 1970. Robert M. Stearns, Clerk]

GRUMMAN AIRCRAFT ENGINEERING CORPORATION, PLAINTIFF

v.

THE RENEGOTIATION BOARD, DEFENDANT

ORDER

This matter came on to be heard on plaintiff's motion for an order in accordance with the Court of Appeals mandate granting access to opinions and to investigatory or other factual reports prepared by Board employees. In aid thereof, they seek to depose Mr. Lawrence E. Hartwig, Chairman of the Renegotiation Board. The defendants seek a protective order against deposing Mr. Hartwig.

It is clear from the Court of Appeals decision, *Grumman Aircraft* v. *The Renegotiation Board*, 425 F.2d 578 (D.D.C. 1970), that the final orders and opinions of the Board are to be made public once identifying details have been deleted. It is not clear, however, what constitutes in fact a *final* order and opinion. The deposition of Chairman Hartwig should be an aid in this determination.

The Court therefore denies the Board's motion for a protective order as to Chairman Hartwig and orders the immediate taking of his deposition. Plaintiff's motion for an order in accordance with the mandate is held in abeyance pending the outcome of Chairman Hartwig's deposition.

So ordered.

/s/ [Illegible]
Judge

DATED: October 1, 1970

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GRUMMAN AIRCRAFT ENGINEERING CORPORATION,
PLAINTIFF

v.

THE RENEGOTIATION BOARD, DEFENDANT

NOTARY: Helen V. Allen (Commission expires May 14, 1974)

REPORTER: Sandra Spivak, CSR

Deposition Duces Tecum, pursuant to Notice Friday, November 6, 1970, at 11:00 A.M. at the offices of Mr. Lawrence E. Hartwig, Chairman of the Renegotiation Board Room 800, 1910 K Street, N.W., Wash., D.C.

Appearances:

For the Plaintiff:

Gadsby, & Hannah,
1700 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
represented by:

TOM M. SCHAUMBERG, ESQ.
and
REXFORD T. BROWN, ESQ.

For the Defendant:

The Department of Justice,
represented by:

IRWIN GOLDBLOOM, ESQ.

LAWRENCE E. HARTWIG,

HAVING BEEN FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

DIRECT EXAMINATION

[1] MR. SCHAUMBERG: Chairman Hartwig, I am Tom Schaumberg, Counsel for Grumman Aircraft Engineering Corporation. With me today is Rexford T. Brown, also of the firm of Gadsby and Hannah.

BY MR. SCHAUMBERG:

Q Would you please state your name and present address.

THE WITNESS:

A Lawrence E. Hartwig, 3520 39th Street, N.W., Washington, D.C.

Q What is your present place of employment?

A Chairman of the Renegotiation Board.

Q How long have you held that position, sir?

A Since April, 1961.

Q Where were you employed prior to that?

A I was a member of the Renegotiation Board.

Q And how long have you been a member of that Board?

A Since October 3, 1951.

Q Does that date indicate that you have been a member of that Board since its inception under the '51 Renegotiation [2] Act?

A Yes.

Q Would you please subscribe your duties as Chairman of the Renegotiation Board?

A Well, the duty of the Chairman of the Renegotiation Board is to preside over the Board meetings, to operate as the chief administrative officer with respect to duties which the Board entrusts to the Chairman. To see that the cases are processed expeditiously. To participate in Board deliberations with respect to cases and the decision of cases, the promulgation of regulations, bulletins and rulings, published policy statements, and to act as the spokesman for the board on Capitol Hill with respect to Board legislation and elsewhere.

Q As Chairman of the Board, are you familiar with every aspect of its operations?

A I think I am. I'd like to think I am.
Q Did you receive a notice of deposition?
A Yes, I did.
Q Did you bring with you into the hearing room the documents that were mentioned in that Notice?
A Well, the files are very voluminous and they are in another room not far from this office.
MR. SCHAUMBERG: We will go off the record.

[Whereupon, a discussion was held off the record.]

[3] MR. SCHAUMBERG: We will go back on the record.
MR. GOLDBLOOM: Would you read the last question and answer?

[The record was read by the reporter]

MR. SCHAUMBERG: Why don't you make a statement about what happened as a result of our off the record discussion, Mr. Goldbloom?
MR. GOLDBLOOM: The files have now been brought into this room, and they are here.

BY MR. SCHAUMBERG:

Q Chairman Hartwig, are those all of the files that were called for in the subpoena?

THE WITNESS:

A To the best of my belief.
MR. GOLDBLOOM: I didn't count them this morning, or look at them; but I understand that the files in connection with your subpoena were amassed. They were not here at the Board, as I understand it, at the time. Most of the files, as I understand it, or a good many of them, were out at the Los Angeles Regional Board, or the Western Regional Board, and had to be shipped here.
MR. SCHAUMBERG: We appreciate that.

BY MR. SCHAUMBERG:

Q Chairman Hartwig, before we get into the detail and contents of any of these files, would you be kind enough [4] for the purposes of this record, to give us a short description of the renegotiation process?

THE WITNESS:

A Yes. All filings over the floor—over the million-dollar floor—are made here at the headquarters. These filings then go through what we call the screening process. First they go to the Office of Accounting, to check the segregation of sales, allocation of costs, and then to the Office of Screening and Exemption. If a case does not involve excessive profits, does not pose problems, it is screened out here at headquarters. Cases which may involve excessive profits are assigned to one of the two regional boards, on a geographic basis.

The cases assigned to the regional boards for processing are typically assigned then to a renegotiator and an accountant, who comprise a team. The accountant develops information with respect to the segregation of sales, allocation of costs, the development of the figures. The renegotiator is concerned with securing information from the contractor and from the procurement agency involved, with respect to the contractor's performance and any other matters that are of interest in the evaluation of the profit.

When the—and this now involves meetings with the contractor, correspondence with the contractor.

[5] When the team has secured enough information to prepare its report, it prepares what is called a Report of Renegotiation, which consists of a Part 1(a), the accounting part, and the Part 2, which is the renegotiator's evaluation and recommendation to the Regional Board.

The recommendation of the renegotiator is then considered by the Regional Board, and at this point you have to distinguish between the Class A case and a Class B case. A Class B case is one in which the renegotiable profits are less than $800,000. In that kind of case, the Board has delegated final authority to the Regional Boards to conclude the case by a clearance or by refund agreement. In all other cases, the Regional Board's action is simply a recommendation to the statutory board because those actions must be concluded here.

Now, there is a little exception to what I just said. Now, take the refund case. If the contractor does not agree with the designation of the Regional Board, in a Class B case, the Regional Board has the authority to issue a unilateral order, which may be appealed to the Statutory Board.

All right. So, let us take a typical Class A Case because those are the cases, really, that are involved in your request. I believe they are all Class A cases. I'll describe the procedure there: the report of the renegotiation is submitted to the Regional Board. They consider the [6] recommendation made by the renegotiator. And let us assume that the renegotiator recommends to the Regional Board that the Regional Board recommend to the Statutory Board that there is a clearance. The Regional Board will then approve the recommendation of the Renegotiator, but not the report, simply the recommendation.

The report, then, with the case file comes up to headquarters for review, because the Statutory Board has reserved to itself authority to conclude those cases. When the recomemnded clearance comes to the headquarters, it is first sent to. the Office of Accounting, which prepares an accounting memorandum addressed to the Office of Review, in which it comments upon the accounting, the figures, and indicates whether in its opinion the Regional Board accountant, his recommendation, has been satisfactory.

Assuming that to be so, then the Office of Review will look at the recommendation of clearance and it will assign a reviewer to the case. And the reviewer will indicate then by way of recommendation to the—to the Board whether he concurs or disagrees with the Regional Board's recommendation.

And the Director of the Office of Review will also indicate whether he agrees or disagrees with the recommendation of the Regional Board.

So that when the case then comes up to the Board on its [7] agenda, the papers have previously been circulated to the Board members for study.

All of the staff's recommendations have been circulated for study by the individual Board members. Each one will conduct his own independent study. Each one has an assistant who himself may look at the case file and look at the underlying documents for the purpose of advising that Board member.

And then, when the recommendation clearance of the Regional Board comes up on the Board agenda, the Board simply approves or disapproves the clearance. It does not adopt any of the memoranda that are before it. It does not ratify or adopt any of these staff memoranda. It simply, in the exercise of its judgment, says it is a clearance or it isn't a clearance. And there is no Board-adopted document which you could call an opinion.

Then, after the Board has acted, the clearance notice is issued to the contractor. Now, I believe that in your Class A case the notice is issued by the Regional Board. If the Regional Board is the one that recommended the clearance and the Board approved the clearance, I think it goes out from the Regional Board.

Q Would you explain to us, Chairman Hartwig, what happens in the instance of a Class A case where the—well, there are two instances, when either the Regional Board [8] makes a recommendation not of clearance but rather that there be a determination of excessive profits, or secondly, in the instance where the Statutory Board disagrees with the recommendation of the Regional Board and determines that there are excessive profits.

A Well, in a Class A case where the Regional Board recommends a refund they will attempt to secure the agreement of the contractor to that recommendation. You must understand that all of our procedure is directed toward reaching agreements with the contractors. And so, even though the Regional Board has no authority to bind the Board with respect to a refund in a Class A case, even at that level there are procedures. The Regional Board attempts to secure the agreement, even before the Statutory Board has reviewed the case.

Well, let's assume then, that the contractor agrees, the recommendation comes up here for review, and we are notified that the contractor agrees. And so the ques-

tion then is whether we will approve this recommendation, and if we do, well then of course the agreement is signed.

But the—the case is reviewed by the staff, in the same way that I described the clearance review. It goes to the Office of Accounting, the Office of Review, to make its recommendations to the Board.

Now, in the second case—

[9] Q May I interrupt you for one moment, sir. Are there instances where the Regional Board recommends a refund and where the Statutory Board thereupon reviews the case in greater detail than you just described, namely by inviting the contractor to make a presentation, etcetera, to the Board?

A Let's take the Class A case where the contractor does not agree. That's an impasse case, we call that an impasse case, and that's automatically reassigned up here. And then we—under the statute I have authority to appoint Divisions.

So I will designate a Division of the Board, usually three members, to hear the case. Prior to the time that the meeting is set up with the contractor, with the Division, the case is reviewed by the Office of Accounting and by the Office of Review and they make analyses, sometimes indicating individual differences with views expressed by staff members, all for the guidance of the Division's consideration of the case.

With that, with these analyses prepared at headquarters, and the report of renegotiation, and the case file along with material in the case file before the Division, with all that material before it, the Division then will meet with the contractor and at that meeting, as our regulations state, the contractor will be given a completely fresh look at his case.

[10] In other words, under our procedure, neither the division nor the Board is bound in any way by the determination of the Regional Board; the refund could be higher, lower, or result in a clearance. So after the meeting with the contractor, in which he presents his arguments, and the case is submitted for decision, the Division then will meet and decide the recommendation

it will make to the full Board, and it prepares a Division Report to the full Board. And let us assume, for example, that they recommend a refund. Well, it doesn't make any difference whether they recommend a refund or a clearance. The fact is that when the Board adopts the recommendation of the Division, it does just that. It does not adopt the Division report. It adopts the conclusion. It adopts the conclusion or the recommendation, but not the report.

Then, after the Board has made its determination, as you know, the contractor is notified and is given a period of time to indicate whether it agrees with the determination or wishes to have the Board issue a unilateral order.

Now, again, let me point out that this carries out the spirit of our procedure, which is that here we always try to reach an agreement. The order is the last step in a case. If, actually when the procedure falls down, that's when we issue an order. Because we always try to get an agreement.

[11] And so, the next step then is to invite the contractor, get him to agree or disagree, ask him whether he agrees or disagrees with the determination. At that point in our procedure, we have an administrative document which we call a Summary of Facts and Reasons, which the contractor may request if he wishes, in order to enable him to make up his mind whether or not he will enter into an agreement.

If then the contractor says to the Board within the time period that he cannot decide whether to agree or not without receiving a summary, he requests a summary, and we will issue it to him. After we issue the summary, which is again designed to persuade him to agree, he may—and has in some cases, as I think my affidavit points out—indicate some errors in the Board's decision.

If that is so, then the determination is corrected, and a modified determination is made. At that point, of course, he is invited again to agree or disagree. And then, at the end of the road, if he says finally he does not agree, we will issue a unilateral order, the order

that is proscribed in the Act, and which is final so far as we are concerned because it starts then the 90-day-period for appeal to the Tax Court.

After that ordered is entered, issued, the contractor is entitled to a statement of facts and reasons, upon his request. [12] In both instances you will note that in the case of the summary it is not issued except upon request of the contractor, and likewise in the case of the statement.

Q I believe you were also going to explain the instance when the Regional Board recommends clearance and the Statutory Board reviews the matter and determines that there are excessive profits.

A Well, the procedure there is essentially the same as it is in the impasse case, the ony difference being that in that case the recommendation of clearance will be considered by the Board and the Board will determine that it cannot at that point approve the recommendation, so it will reassign the case to the Statutory Board for further proceedings. And in that case, as in the impasse case, a Division will be set up, the same kind of study and analysis made by the same people who worked on the impasse cases. And then after a meeting with the contractor, if it does result in a refund, then it will have the same procedure.

Q Directing your attention first, Chairman Hartwig, to those instances where cases are screened out at the Statutory Board level: by letter of June 18, 1970, the Secretary of the Board transmitted to us certain documents which included a document entitled "Notice of Clearance without Assignment". Is that the document whereby a case which is screened out at the Statutory Board level is terminated?

[13] A That is the document which indicates that the Board will not, has decided not to proceed further with the case.

Q When you say that the Board has decided that, is that decision in fact made by the Board?

A Well, that brings up the question of relegation to the Office of Screening and Exemption.

THE WITNESS: Let us go off the record.

[Whereupon, a discussion was held off the record]

THE WITNESS: Let us go back on the record.

THE WITNESS:

A Paragraph 4(c) of General Order 2 of the Board delegates certain authority to the Office of Screening and Exemptions. It says that that Office shall have authority "without requiring approval of the Board, to cause filings to be assigned or cleared" by that Office.

And then I'll omit some language that isn't pertinent here, "but that prior Board approval shall be required for the clearance for filings in the following circumstances:

1) When the filing of a Broker-Agent shows renegotiable commission income in excess of $100,000, and renegotiable profits in excess of $50,000.

2) When the filing of any other contractor shows a renegotiable sale in excess of $10,000,000 or renegotiable profits in excess of $200,000."

[14] So, that office has authority to screen out cases under this delegation and has to submit to the Board its recommendations for cases that do not fall within that delegation.

Q May I ask you, Chairman Hartwig, what the date of promulgation of that order is?

A This is June 16, 1970. This was amended June 16, 1970. Actually the order had been in effect for a number of years prior to that. We put a new date on each of these orders every time we amend it.

Q How long has that document been available to the public?

A I think this document was—I don't.

MR. GOLDBLOOM: You don't know.

THE WITNESS: I don't know.

BY MR. SCHAUMBERG:

Q Let me rephrase the question, Chairman Hartwig. How long has that document, either in its amended form,

or any of its predecessors, which you say have been in effect for a number of years, been available to the public?

THE WITNESS:

A The reason I hesitate is that we have a large project here to implement that Freedom of Information Act and this is only one of a larger package of administrative orders and general orders that we reviewed to determine which we had to place in the library and what we didn't have [15] to place in the library. So, I am able to pinpoint the date at that time. But I do know that it was placed in the library in accordance with the effort on our part to comply with the Freedom of Information Act.

Q To your knowledge is that General Order published in the Code of Federal Regulations?

A I don't know.

Q If I have understood your testimony correctly, you have stated that unless—well, I don't want to rephrase your testimony, but there are instances when the office of Review has been delegated the authority to send to the contractor in question a Notice of Question without assignment?

A That's the Office of Screening and Exemptions.

Q Do you have in this room any files which include such a document as the Final Order of the Board?

A You mean do any of these files, is your question do any of these files contain a Clearance without Assignment Notice?

Q That is correct.

A Well, I think so.

Q And if so, would you please place before you one such file.

MR. GOLDBLOOM: We will go off the record.

[Whereupon a short recess was taken]

MR. GOLDBLOOM: We will go back on the record.

[16] MR. SCHAUMBERG: Would you read back the last question and answer, please.

[The record was read by the reporter]

BY MR. SCHAUMBERG:

Q Do you now have before you, Chairman Hartwig, a file which resulted in a Notice of Clearance without Assignment?

THE WITNESS:

A Yes, I do.

Q I should like to ask you, starting with the last document in that file, to give us a description of the following document or the document which—actually, precedes that document, by telling us either the date and/or something that will identify the document.

A All right. The first document is a Notice of Clearance without Assignment.

The next is a form called "Office of Assignment, Analyst's Worksheet," which simply gives the history of this particular company in renegotiation. That is, what happened in prior years, that sort of thing, for informational purposes. And it would also contain references to, as it does in this case, wholly owned subsidiaries, which would be in a separate file.

The next is a form letter addressed to the company, requesting information pertaining to voluntary refunds and [17] price reductions.

The next is a, is the contractor's filing, with schedules and the annual report.

MR. GOLDBLOOM: Of the contractor?

THE WITNESS: Of the contractor, which the contractor probably submitted with the RB 1.

Next is a letter to the company responding to the request for an extension of time to submit data. And the letter preceding that is from the company requesting an extension of time relative to the submission of their tax data.

Can I strike that?

MR. GOLDBLOOM: You can add to it.

THE WITNESS:

A All right. I will add to it. Well actually the letter says "In view of this company's prior year's ex-

perience relative to the submission date of their immediate income tax return, and in view of the time required to consolidate certain figures," they want an extension of time to make their renegotiation file.

And the letter preceding that responds to that request.

BY MR. SCHAUMBERG:

Q For my purposes you have gone far enough into that file, unless to make the report complete you would like to read the rest of the documents in, I see no need for it.

MR. GOLDBLOOM: Have you described the entire file?

[18] THE WITNESS:

A No, there is in the cover the screening report. That form simply records in capsule form, you might say, the figures presented in the contractor's filing.

BY MR. SCHAUMBERG:

Q Does that document have sub-parts to it, so that you can describe the various parts of it, or is it just a series of numbers on a form?

THE WITNESS:

A It's a series. It sets forth the renegotiable sales and profits, the returns, and—

MR. GOLDBLOOM: Returns?

THE WITNESS:

A Return rates, return on sales, return on net worth return on capital.

It sets out information—and this is all gleaned from the contractor's filing, with respect to officers' salaries, and turnover rates, information with respect to material costs, including subcontracting. And then there is simply a form box to be checked: "Method of sales, segregation acceptable?" Box, yes. Check yes. "Method of cost allocation acceptable?" Box checked yes.

And then a box at the bottom which is checked by staff employee of the Office of Screening and Exemptions:

"Clearance recommended?" Box yes.

[19] There is also a line which indicates whether the contractor has self-applied the commercial exemption. In this particular case the contractor did not self-apply the commercial exemption.

That's it.

Q Is that the only other document, then, in addition to those that you enumerated before?

A Yes.

Q Is there a document in that file that considers the so-called statutory figures?

A Not in this file.

Q Are there instances, to your knowledge, where the statutory figures are considered by the Office of Screening and Exemptions?

A Well, I would say in response to your question that in all cases the screening people apply the statute. But to make myself clear—and this may provide an answer to your question—take the most obvious case where a contractor reports an overall loss on renegotiable business. And I believe our recent experience has been that about 20% of the filings are in that category. I ask you whether you are applying the statutory factors when you say that a contractor who has a loss has not made excessive profits. Or, who has obviously low profits.

Q Well, taking another example, however, where there [20] are indeed profits on renegotiable business rather than a loss, are there instances where the screening report will cover the statutory factors such as: character of the business, extent of the risk assumed, contribution to the defense effort, capital employed, efficiency and reasonableness of costs, and profits.

A Well, I think that when the screening people find a case which requires an extensive exploration and requires the application of the factors, this is a case which is assigned to a Regional.

Q In any effort, then, to have a complete record, I would appreciate it if you would check the screening report in three or four other files, to determine if in any one of those you see any reference to the statutory factors that I just enumerated.

A Well, my general knowledge—

MR. GOLDBLOOM: Let us go off the record.

[Whereupon, a discussion was held off the record.]

THE WITNESS:

A You won't find a discussion of the statutory factors; but I want to indicate that perhaps the reasonableness of costs and profits, which is a factor in the law, is the one that is considered, at least impliedly, when you screen out a case involving a loss or a very low profit. And so, while there may not be a discussion of the factors, the [21] factor which makes the case a candidate for clearance early in the process would be applied.

I may also wish to add to this, there is a loss-carried-forwarded provision in the statute, a 5-year loss-carried-forward. And in a case when the loss-carried-forward wipes out the contractor's profit, that kind of a case would be a candidate for clearance without assignment.

BY MR. SCHAUMBERG:

Q In those cases which are terminated with the Notice of Clearance without Assignment, is there characteristically any consideration given to comparisons of that contractor by other contractors using the same product or using the same processes?

THE WITNESS:

A This would be the exceptional case, I would say, because you're dealing in these cases with obviously non-excessive profits, and our people develop expertise through the years, and just know that in a certain industry or sub-industry, if a person has one-half of one percent profit on sales, that that is not excessive profit. There are comparisons of the company with its past renegotiation experience, because that information is available to this committee.

Q Are the rules of thumb that you just referred to, such as one-half of one percent, are those reduced to writing [22] anywhere for your employees to consider?

A No. It would be impossible to do it.

MR. SCHAUMBERG: We will take a short recess.

[Whereupon, a short recess was taken]

MR. SCHAUMBERG: We'll go back on the record.

BY MR. SCHAUMBERG:

Q Referring, Chairman Hartwig to Paragraph 4(c) of the General Order 2 which you read into the record before, that paragraph indicates that "prior Board approval shall be required for the clearance of filings when the filing shows renegotiable sales in excess of $10,000,000 or renegotiable profits in excess of $200,000." Is any such file included in the group that you have provided us with, the final document in? It is my understanding that the file that we just went through—

MR. GOLDBLOOM: Do you understand the question?

BY MR. SCHAUMBERG:

Q It is my understanding that the file we just went through, Chairman Hartwig, was not the exception that I just read to you. That was a file where the staff was authorized to issue the clearance. What I am now asking about is the case that is the exception.

MR. GOLDBLOOM: Let us go off the record.

[Whereupon, a discussion was held off the record]

MR. GOLDBLOOM: Let us go back on the record.

[23] THE WITNESS: Would you repeat the question again?

[Whereupon the record was read by the reporter]

THE WITNESS:

A Well, the case that I described was then not the exception. That was a case that was submitted to the Board for approval.

BY MR. SCHAUMBERG:

Q Just so the record is clear, so that is the exception?

A That is the exception. Well, it's—

MR. GOLDBLOOM: Why don't we define our terms, rather than talking about exception and non-exception?

THE WITNESS:

A The case I described was a case where the Office of Screening and Exemptions did not have delegated authority to screen out the contractor. In that actual case, the office submitted its recommendation to the Board and the Board approved it. So that the Clearance without Assignment in that case went out without approval.

BY MR. SCHAUMBERG:

Q And that Board approval was given on the basis of the documents that you identified earlier?

THE WITNESS:

A Yes. There is one other document which is not in this file and it simply a typewritten list of the cases which [24] are recommended for clearance by the Office of Screening and Exemptions. They will submit their list to the Board for approval or disapproval.

Q Are these then decided by the Board en masse?

A Yes. Well, one at a time, yes. I thought you meant with the Board en masse. No, the Board goes through each case on the list and decides whether it will approve the recommendation or whether the case should be assigned for further processing.

Q And is it correct, Chairman Hartwig, that all of those cases that come to the Board for approval never have—at least in the files that are the subject of this case—an analysis as such of the statutory factors? And when I say "as such" I recognize that reasonableness of cost and profits is always inherent in a decision. But other factors such as contribution to the defense effort, etcetera, are not necessarily inherent in that.

A That is right. The committee will, in capsule form, set forth some basic statistics for the information of the Board. The kind of statistics that I showed you were on the screening report, and this enables the Board then to itself, if it wishes, or an individual Board member wishes, to investigate the case file, to make his own study to decide whether it would approve the recommenda-

tion, or whether the case should be assigned for further processing.

[25] Q Does the Board keep minutes which reflect the decisions made on these—

A The Board does.

Q Are those minutes available to the public?

A No. I may say the minutes simply record that the Board approved the recommendation of the Office of Screening and Exemptions with respect to the following-named companies. There is no record discussion.

Q Turning now to the cases which resulted in a Clearance after Assignment, do you have such a file available to you.

A Yes.

MR. SCHAUMBERG: Would you, Mr. Goldbloom, make a list of each of the files that the Chairman goes through during the course of this deposition?

MR. GOLDBLOOM: I'll keep a record of the Board files which are used, from which the Chairman is testifying.

MR. SCHAUMBERG: Thank you.

MR. GOLDBLOOM: All right.

BY MR. SCHAUMBERG:

Q Would you please take that file and, starting with the last document, go through the same identification procedure that you did previously.

THE WITNESS: Let's go off the record.

[Whereupon, a discussion was held off the record]

[26] BY MR. SCHAUMBERG:

Q It will be satisfactory, Chairman Hartwig, if you would like to start with the assignment and then move forward in the renegotiation process.

THE WITNESS:

A All right. The first document in the file is a form, "Assignment, Suggestion and Notice," which accompanied the file to the Regional Board, and it makes certain comments with respect to certain points that should be explored among others.

Q On that point, Chairman Hartwig, are those points that relate directly to certain statutory factors?

A In this case the points were largely segregation of sales and allocation of costs. And it so happens that those were the initial suggestions or comments. I know from general knowledge that there are other cases where questions involving the statutory factors would be noted on the assignment sheet, but you must remember that the Region's study of the case is not confined to the suggestions made by the headquarters staff. These are simply a way of starting the region to conduct its study.

The next document, RB 1, Filing of the Contractor.

MR. GOLDBLOOM: Excuse me. What is that?

THE WITNESS:

A The RB 1, the Filing, the Contractor's Filing. [27] Some of these documents are not in chronological order. The next document is a memorandum from the Director of the Office of Accounting to the Director of the Office of Review, commenting on the account in Part 1(a).

The next is Notice from the Chairman of the Regional Board to the contractor stating that the case has been designated as a Class A case.

Next is a notice of commencement of renegotiation.

Next is a memorandum of a conference between the renegotiator and the accountant and representatives of the contractor.

Next is a document listing the major prime and subcontracts by number.

Next is a request from the contractor for an extension of time to file certain information that had been requested.

Next is a document notifying the contractor that due to the retirement of the renegotiator assigned to the case that it had been reassigned to another renegotiator.

Then there is a letter from the contractor to the Procurement Agency with respect to certain prices that were bid on certain contracts.

And then—this seems to be a copy of an agreement between a procurement agency and the contractor with

respect to treatment of independent research and development.

And then there is a letter enclosing, transmitting that [28] agreement to the regional board.

Then there is a document submitting the information to the Regional Board which had been requested.

MR. GOLDBLOOM: Is that from the contractor?

THE WITNESS:

A From the contractor.

The next is a summary of the contractor's financial data, which is called a "Schedule A." And then a letter transmitting to the contractor the Part 1(a) which is the account report, including the Schedule A.

Next is the minutes of a telephone conversation between the accountant and a representative of the contractor, requesting more information with respect to an accounting point.

Next is a letter from the contractor to the accountant, submitting some additional accounting information.

Then there is the Report of Renegotiation.

Then there is a letter from the Regional Board to the contractor stating that the "Regional Board had made a final recommendation "that you have not realized excessive profits and that the Statutory Board has been notified."

It states further that the "Statutory Board will decide whether or not it is in accord with the recommendation."

BY MR. SCHAUMBERG:

Q Excuse me, Chairman Hartwig, did you testify earlier [29] that in a Class A case such approval had to be obtained in every instance by the Statutory Board?

THE WITNESS:

A Yes. The next is a form prepared by an accountant, setting forth the figures involved in this case. This is prepared by the Regional Accountant.

Next is a form transmitting the documents to the headquarters.

Q Which documents are those, sir?

A The complete case file.

Then there is a memorandum from the Office of Accounting directed to the Office of Review, commenting on the accounting in the Part 1(a).

The next is a document entitled "Review of the Determination, Office of Review," setting forth the sales and profits, and accompanying that document is a memorandum of a reviewer in the Office of Review, which discusses the case and concludes, "In view of the above, it is recommended that the contractor be given a clearance notice."

Q Turning back to—

A Excuse me. Now, over in the other part of the file there is a folder containing performance reports, and the report of the public accounting firm with respect to this company, and copies of the company's income tax returns. Also what appears to be an accountant's work papers.

[30] Q Does that constitute the entire file of that contractor for the entire renegotiable year?

A Well, there is an assignment file, I believe, that would contain the material I described with respect to the other case, because this case went through the screening process but didn't end at headquarters. It was assigned to the region. The assignment file would simply—

MR. SCHAUMBERG: Let us go off the record.

[Whereupon discussion was held off the record]

BY MR. SCHAUMBERG:

Q If you would, turn back to the report to renegotiation which you referred to. Does that document contain sub-parts or headings, or anything to differentiate one portion of it from another?

THE WITNESS:

A Well, the first part, the caption is "Report of renegotiation," the first part is "Part 1(a), Accounting Section," and "Part 2,"—

Q Excuse me, before you go into part 2, it is called part 1(a) because there is a Part 1(b), is this right?

A There was a Part 1(b) which at one time was used to summarize a contractor's representations, or where the report from the contractor was short, perhaps the entire report would be incorporated in the 1(b). But that practice has largely been abandoned because those who are reviewing [31] those reports will go through the entire statement of the contractor rather than rely on a summary of the contractor's statement. So, while the 1(b) for all practical purposes no longer exists, we still call the accounting section 1(a).

Q Thank you. Moving on to Part 2, does that have any sub headings?

A No. Part 2, well, there are sub headings under the factors.

Q Could you go through that for us, item by item?

A Well, there is Subheading A, Sources of Information. B, Application of Statutory Factors. One under that. Character of Business. Two under that, Capital Employed. Three, extent of risk assumed. Fourth, contribution to the defense effort. Five, efficiency. Six, reasonableness of costs and profits.

A under that, costs.

B under that, pricing.

C, profits. And then a large C, capital C, entitled "Special Matters", and then a capital D, Conclusion and Recommendation.

Q Could you describe generally what is included in the heading "Sources of Information," without revealing anything that should not be on the public record, but just what types generally of information are contained there?

A For example, it states that performance data were [32] filed and indicates the file period. This is for the information of the reviewer. The report refers him to the case file, to examine the performance data.

Q Is that all that is referred to?

A Well, in this particular case the contractor did not submit a statement of factors. It makes that statement. And the third point is that there was no visit to the contractors of this plant. That's all there is.

Q Is there, under Heading B, Application of the Statutory Factors, a place where the contractor is compared with other contractors, producing the same or similar product or using the same or similar processes?

A I don't see any comparison with respect to the factors here.

Q Could you tell us again generally what kind of information is contained under Heading C, Special Matters?

A This referred to a claim which the contractor has outstanding against someone.

Q Is that all that is contained?

A That's all.

Q And what is contained in Section D?

A Well, this is the conclusion and recommendation, and the final language is "It is accordingly requested that the Eastern Regional Board recommend to the Renegotiation Board that a clearance notice be issued to the contractor for [33] the year in question."

Q Have we now gone completely through the report of renegotiation?

A We have.

Q Would you then turn to the memorandum by the reviewer in the Office of Review to which you referred.

A All right.

Q Could you describe that document in some detail? Does it have any headings, for instance?

A Well, it has headings "Business, Costs and Expenses"—

Q Excuse me. Do those have Roman Numerals or letters or anything?

A No, they are just headings without Roman Numerals.

Q Could you give those to me then, please?

A Business, costs, and expenses, selling and advertising, general and administrative expenses, government assistance, net worth, performance information, statutory factors, recommendation.

Q How many pages are in that document?

A Oh, a little more than two pages, single-spaced.

Q Going to each one of those headings now, could you tell us just generally again what is contained under each one of them?

A Well, under Business, there is a description of [34] the—a short description of the product involved. Under the Costs and Expenses, selling and advertising, general administration, there is a short discussion of the pertinent statistics. Under Government assistance, there are statistics with respect to type and amount of Government assistance. Net Worth sets out again the figure, noting what the figure was in the prior year. Under Performance Information, there is a general summary of the comments of the various Government agencies on the contractor's performance.

And then under the Statutory Factors there is a very short characterization of the—well, actually, under the Statutory Factors, this is simply a summary of the Part 2, it sets forth here the summary of the Part 2 and indicates that he is in agreement with the Renegotiator's summation of the factors. And then the recommendation concludes: "In view of the above it is recommended that the contractor be given a clearance notice."

Q When you went through that file I did not hear you indicate at which point the Board gave its approval to the recommendation.

A Well, that would be in another file. This report of the Office of Review, the comments of the Office of Accounting, the Report of Renegotiation, would all be presented to the Board for consideration at a Board meeting.

And the case would appear on the Board's agenda, and the [35] Board—I assume in this case, since a clearance was issued—the minutes would simply record the Board approved the clearance. This is the typical minute.

Q Did you say there was a separate file that contains this information?

A What information?

Q That you just went through. I believe you stated a moment ago that there was a separate file?

A No, I was simply trying to—

MR. GOLDBLOOM: No, he was explaining how—
THE WITNESS:
A —how this came before the Board.

BY MR. SCHAUMBERG:

Q Right.

THE WITNESS:

A And I was explaining that in this case as in all other Class A cases like it, typically each Board member would receive a copy of the Review of Determination, a copy of the reviewer's recommendation—if there was one. In this particular case there was one. In some cases you wouldn't even have this—and also a copy of the Report of Renegotiation. Those three documents would be presented to each Board member. Each would receive a copy for consideration at the next Board meeting. This gives the Board member, then, the time to examine any other documents in the [36] file that they wish to examine prior to the Board meeting.

But you can understand, because of the limitations, is is impossible to make five copies of a case file for Board consideration, so these documents are selected for this purpose from a case file and give the Board member a lead into the case.

Q Are there then, in fact, five copies made of these documents that are given to each Board member?

A I'm afraid to say this, but I think there are more than five.

Q More than five?

A We try to keep the number down; but . . .

Q Are those files kept with the case files, those five files that contain these documents?

A No, those extra copies are retained by the Board members.

Q Doesn't—

A —and from time to time there is a housecleaning.

Q Does the Board member ordinarily bring his file to the meeting of the Board?

A He does.

Q Does the Board member ordinarily make any written comments on the file which he was given?

A [Shakes head negatively] It would be an exception.

Q Going back for a moment to what is contained in the [37] file that each Board member receives, you stated that he obtains a copy of the report of renegotiation, and then you said that he also receives two other documents. Could you tell me again what those two other documents are?

A Well, the report of the Office of Accounting and the report of the Office of Review. Those are the two offices which review the case.

Q This is a little bit unclear to me: I believe you stated the first time that one document, you called it "The reviewer's recommendation," which you said is not given in every instance but was in this instance—

A He gives his recommendation, but he sometimes does not file a memorandum.

Q In the file that we just went through there was indeed such a memorandum.

A There was a memorandum. May I also clarify the record here. The Review of Determination is a form which has at the bottom a provision for indicating concurrence or disagreement by the Office of Review, and there is a box in which the reviewer can check if he concurs or disagrees, and there is a box in which the Director of the Office can check whether he concurs or disagrees.

Now, in this particular instance, in this case, the reviewer concurred in the recommendation of the negotiator of the Regional Board, and filed a short memorandum which is, [38] in effect, a part of this document which you call "Review of Determination." The Acting Director of the Office of Review also indicated concurrence in the box after the Director's name. There are instances where the reviewer and the Director will disagree and the disagreement comes before th Board. It is indicated in this manner. And where there is a disagreement which might, as in this case for example, if the Acting Director disagreed with the memorandum of the

reviewer, he may have also filed a memorandum indicating his disagreement with respect to some point.

Q That did not happen in this case?

A That did not happen in this case.

Q What then happens when the Board members get together after having read their respective files?

A Well, they come to the Board meeting and vote on the recommendation.

Q And on what would you say their decision is based?

A Well, it certainly isn't about to be based, ever, on any opinion finally expressed in any one of these documents. Many times a Board member will agree to a clearance, in this case for none of the reasons stated in the staff document. He may have his own reasons. His own assistants may have checked out some point that was bothering him, that he didn't even discuss with his colleagues. But the important thing is the informality of our procedure, whereby we [39] all agree that we agree on the results.

Q Excuse me. I didn't hear that.

A I say, when we agree, we agree on the result. We do not ratify or approve any one of these reports.

Q You are suggesting that the result can be separated from the reasons?

A I am not only suggesting it, I am saying it. Just as a practical matter, this is the only way the Board can do its job. You understand that it's our mandate to eliminate excessive profits where these exist. And when they don't exist it makes no sense to debate whether this particular document should be approved or some other document should be approved. We will have cases where the reviewer may disagree with the negotiator now on Part 2 out in the region. If we get the same result as the negotiator out in the region, that doesn't an actual issue between the reviewer and the negotiator on a particular point. This is unnecessary.

Q Taking the file that's now before you, you say that it is the job of the Board to determine whether there are excessive profits. And you say there is no reason to engage in a debate where there are none. How do you know there are none?

A Well, each one, each Board member, for reasons of his own, will conclude in the case that the profits are not [40] excessive. But the views of one Board member may not coincide with the views of another Board member. That is, they may both agree on the result, but they may not necessarily agree on the evaluation of one particular factor or another.

Q Is there any document which states the reasons why the Board approves the clearance recommended by the Regional Board?

A There is no Board-approved document, in that instance.

Q Is there any document which shows that a Board member might have disagreed with the result?

A In some cases, a Board member may have also filed a memorandum before the Board for their information, and say that "I disagree with the clearance."

Q But there was no such separate Board memorandum member in this particular file?

A Not in this case.

Or there may be cases where the Board member simply may have orally expressed a view, which is not recorded anywhere, and said, "I dissent."

Q Do your minutes reflect such dissents?

A If the Board member would file a document for the Board's file, the minutes would show the words of the Board member's document in the file, yes.

Q But would the minutes reflect that he dissented from [41] the result?

A Oh, yes.

Q Would the minutes reflect the reasons for his dissent if he gave them orally?

A No.

Q Would the minutes reflect the reasons for Board concurrence if those were given orally?

A No.

Q Do you have available to you at this time the earlier file?

A Yes.

Q Without asking you to go through that entire file, perhaps you could simply refer to the last several docu-

ments which show why that file, rather than going through the "Clearance without Assignment" procedure, resulted in assignment?

A The only document I find that sets forth the reasons for assignment is the document I discussed first in this other file, the "Assignment, Suggestion and Notice."

Q That same document is contained in the file that you are looking at right now?

A Yes, a copy of that document is in this file.

Q Is there a prior document which explains why those particular topics were suggested for review?

A I don't find any other memos on the point. Or any [42] memo for that matter.

Q Is there a screening report in that file, Chairman Hartwig?

A I don't see one here. I will have someone look for the screening report after the luncheon recess.

Q Chairman Hartwig, I am still confused on one aspect of your earlier testimony. You stated that here each Board member gets—or at least in this case got—three documents, one of which was the Report of Renegotiation, another being the Reviewer's Recommendation. Now, is that the same as the Report of the Office of Review?

A I think you can say that that is the Report of the Office of Review. But let me make this clear: the Report of the Office of Review is entitled "Review of the Determination." That's a form, which sets forth as I said before a short description, one-sentence description of the products, the name of the contractor, the fiscal year, the renegotiable sales and profits, and the nonrenegotiable sales and profits of the contractor, with provision down below for the signature of the reviewer and of the Director, to indicate whether he concurs or disagrees with the Region's recommendation.

The memorandum of the reviewer technically, I suppose you would say is a part of this Review of Determination. In some cases the reviewer does not submit a memorandum.

Q And then the third document is the Report of the [43] Office of Accounting?

A That's right.

Q That the same as Part 1(a) of the Renegotiation Report?

A No, that is the report prepared by the Office of Accounting at headquarters, commenting on the Part 1(a).

Q Could we just very quickly go through that particular document. I didn't ask you about that to see what it includes.

A This particular document simply goes through the important matters in the 1(a), and indicates—in this particular instance—that the 1(a) "disclosed no exemptions which significantly affect the filings," and that "the Office of Review is in agreement with the sales, segregation and cost allocation."

Q Do you know what they mean when they say "no exceptions"?

A Well, exceptions to the accounting, treatment of—exceptions to, let's say, allocation of costs.

Q To the contractor's method of allocation, in other words?

A Yes.

MR. SCHAUMBERG: In that case, I am ready for lunch.

THE WITNESS: All right.

MR. GOLDBLOOM: Shall we reconvene back here in about [44] one hour, at 2:30?

THE WITNESS: Okay.

[Whereupon a recess was taken until 2:30 P.M.]

BY MR. SCHAUMBERG:

Q During the luncheon recess, Chairman Hartwig, were you able to locate the screening report relevant to this file?

THE WITNESS:

A Yes.

Q And what does that report consist of?

A It's approximately the same type of report that I described in the other file. It contains the same kind of information on sales and profits on renegotiable business, non-renegotiable business, and the various ratios that I described.

But I think more specifically tied in with the matter of assignment, this report had comments on it which tie in with the "Assignment, suggestion and notice" Report which I described earlier. The comments are:

1) Referring to the column entitled "Other": ———, includes facilities in X dollars," and Note 2 states that the sales in that column are subject to price redetermination. And then there is simply the notation "Assignment suggested."

At the bottom there appears a notation "Assigned for accounting reasons." Those accounting reasons are stated [45] in that "Assignment, suggestion and notice sheet" that I described.

MR. SCHAUMBERG: Okay. In an off-the-record discussion we have agreed to call the file to which you are presently referring as "File 2," "File 1" having been the first file which you identified as being a file relating to Clearance without Assignment.

Now, for purposes of identifying purposes I should at this time like to identify from this file, number 2, the following three documents: I should like to identify the "Report of Renegotiation" as Exhibit 2a.

(Whereupon, the subject Report of Renegotiation was indicated to be Plaintiff's Exhibit 2a for Identification, but was not marked and was left in place in File No. 2)

MR. SCHAUMBERG: I should like to identify the Report of the Office of Review as Exhibit 2b.

(Whereupon, the Subject Report of the Office of Review was indicated to be Plaintiff's Exhibit 2b for identification, but was not marked and was left in place in File No. 2.)

MR. SCHAUMBERG: And the Memorandum of the Reviewer which is attached there too as Number 2b1.

[46] (Whereupon, the Subject Memorandum of the Reviewer was indicated to be Plaintiff's Exhibit No. 2b1 for identification, but was not marked and was left in place in File No. 2).

MR. SCHAUMBERG: And then I should like to identify the Report of the Office of Accounting as Exhibit 2c.

(Whereupon, the Subject Report of the Office of Accounting was indicated to be Plaintiff's Exhibit No. 2c for Identification, but was not marked and was left in place in File No. 2).

BY MR. SCHAUMBERG:

Q Chairman Hartwig, does—

MR. GOLDBLOOM: May I say something for the record at this point.

MR. SCHAUMBERG: Sure.

MR. GOLDBLOOM: I have in the off-the-record conversation indicated that I do not object to having the deposition transcript identify the specific documents which we are describing and about which Chairman Hartwig is testifying. However, my agreement to so identify the documents is not in any way to be construed or considered as a waiver of our objection which I now raise, or will raise if appropriate at the time. to the production of those documents as parts of the taking of this deposition.

MR. SCHAUMBERG: For the record let me state that it was clearly my understanding that the purpose of the deposition was not only to obtain the oral testimony of Chairman [47] Hartwig, but also to have avail-

able for submission in camera to the District Court those documents called for in our Motion for an Order in accordance with the mandate of the Court of Appeals, etcetera. . .

Would you please read back what I just said?

[The record was read by the reporter]

MR. SCHAUMBERG: I would contend that such submission in camera is essential in order for the District Court to make a determination whether these documents, any one or all of them, constitute opinions of the Board which should be made available in accordance with the decision of the Court of Appeals.

MR. GOLDBLOOM: All right. Responding to Counsel's statement, I consider that this deposition is being taken pursuant to the order of the Court filed October 1, 1970, by Judge Corcoran, and that nothing in that order requires the submission in camera or otherwise of documents from the Board's files, as to which the Government has objected.

BY MR. SCHAUMBERG:

Q So there is no confusion on the point, Chairman Hartwig, are these three documents just identified as Exhibits 2a through c the only documents that were made available to members of the Renegotiation Board in making their decision to approve clearance of this contractor for this year?

[48] THE WITNESS:

A In that specific case?

Q [Nods head affirmatively]

A To the best of my information and belief.

If I misunderstood your question, may I supplement that statement by saying that the entire case file was also available to each Board member for study, but the case file was not individually forwarded to the Board members unless they requested it.

Q Is there any indication on the file that the file was requested by any Board member?

A I wouldn't know.

Q Well, is there any indication on the file?

MR. GOLDBLOOM: Is there a place on that file where it would be indicated?

THE WITNESS: I find no indication.

BY MR. SCHAUMBERG:

Q Now, moving along to the Board's decision in this case, is that decision included in this file?

THE WITNESS:

A Well, the Notice of Clearance is in the file, yes.

Q Is the approval by the Board in the file?

A The approval by the Board would be in the Board minutes, and the excerpt of the Board minutes is not in the file.

[49] Q Is that excerpt contained in any other file, other than a file that just contains Board minutes?

A I am not aware of another file, other than the file containing Board minutes, unless there is a file which contains excerpts from the Board minutes, which are communicated to the Regional Boards after Board action is taken in a particular case.

Q So that this is—

A —simply to inform the Regional Boards as to what happened.

Q Then this file will be complete for purposes of this deposition, I should like to ask you to have available the appropriate minute as Exhibit 2d. Will that be possible?

A I think it would be.

MR. GOLDBLOOM: Well, it's possible. But of course, in our view any availability of a minute would have to, in effect, contain the same kind of deletions which were authorized by the Court of Appeals with respect to the issuance of the Clearance Notice, so that it would not be identifiable except for purposes of this deposition in gen-

eral terms, with a specific company, if you understand what I am saying.

MR. SCHAUMBERG: The purpose of my request is to make available to the District Court the entire dispositive aspect of this case.

THE WITNESS: I—

[50] MR. GOLDBLOOM: I understand that. But what I am saying is that our agreement to make that available would be consistent with having the right to make deletions available as well. Obviously, if the clearance notice is authorized to have deletions, any cognate minute representing that notice would also have to bear the same deletions.

(Whereupon, the Subject Minute was indicated to be Plaintiff's Exhibit No. 2d for identification, but was not marked and had not yet been located.)

BY MR. SCHAUMBERG:

Q Does this file show, Chairman Hartwig, whether there was any dissenting vote, or do you know of your own knowledge whether there was any dissenting vote as to a clearance?

A I don't think there was a dissenting vote in this case.

Q At this point, Chairman Hartwig, I would like to ask you to place before you another file, chosen from random from the 30-some files that are available to you, where there was a clearance issued after assignment. If you would be so kind, would you select out such a file from the files that are available to you. Well?

A Okay.

We will identify the file presently before you as File No. 3, and in order to expedite this somewhat, it is not necessary to identify each and every piece of correspondence [51] in the file. If you could, just go through it and tell us, you know, what the principal documents are as you see them.

A Do you want me to start at the top and work back or—

Q Why don't we do it in chronological order, as we did the last time?

A Starting with the first document, this is an RB 1, Contractor's Filing with attachments.

A request for consolidation: this happened to be a group that was entitled "consolidation" so it involved more than one corporation, quite a number of corporations.

And there appear to be quite a number of financial statements that apply to some of the affiliates of the main company.

Then there is correspondence with the company asking for more data—

MR. GOLDBLOOM: Whose is that? Excuse me, just so the record is clear, is that correspondence by the Board?

THE WITNESS: Correspondence by the Regional Board. It's then assigned to a Regional Board.

This is primarily a file which is replete with financial statements of the various companies and supplementary accounting data which was derived, and then we have the Report of Renegotiation.

[52] BY MR. SCHAUMBERG:

Q Does that document have a date on it?

A The report of renegotiation?

Q Yes.

A Yes, it gives the date that it was prepared by the renegotiator.

Q For purposes of identification, could you give us that date?

BY MR. GOLDBLOOM: All right.

THE WITNESS:

A July 25, 1969.

BY MR. SCHAUMBERG:

Q 1969?

THE WITNESS:

A Right.

Q Could you describe for us what is contained in that Report of Renegotiation, please?

A Well, like the other one I described there is the Part 1(a) which contains the accounting data, the schedule, and Part 2, again with the captions which I described in the other case.

Q Would you read those captions again, please?

A Application of the Statutory Factors—

Q Could you give me the numbers again?

A Number 1, Application of Statutory Factors. A., [53] under that, Character of Business. B., Reasonableness of Costs and Profits. C., Extent of Risk Assumed. D., Capital Employed. E., Contribution to Defense Effort. F., Efficiency. G., Special Matters.

And No. 2, Determination and Proposed ED Settlement.

Q Could you tell us the types of things that are covered under "Special Matters"?

A I don't know whether I could do that without disclosing the company involved here.

MR. GOLDBLOOM: Well, if you can't, you're not supposed to—you're not to disclose the company involved.

THE WITNESS:

A If I were to describe these special matters, you'd know what the company is.

BY MR. SCHAUMBERG:

Q Could you tell us generally what is covered under the category "Special Matters"?

A Claims by the contractor which are in litigation, claims against the contractor which are in litigation. Sometimes there is reference to general accounting reports which have been made public.

Sometimes there is an important exemption question which is in dispute. That would be a special matter because those disputes do not occur in most cases.

Oh, there might be a reference to a report of a Congres- [54] sional investigating committee involving this particular contractor.

MR. GOLDBLOOM: Excuse me, you are testifying in general terms, aren't you? You're not saying it's in this particular case?

THE WITNESS:

A No, I'm not saying this particular case.

It could be that in some instances there might be some reference here to Internal Revenue, adjustments that are still open.

BY MR. SCHAUMBERG:

Q If there are no others that come immediately to mind, what is covered under the section heading "Determination and Proposed ED Settlement"?

A Well, this is another caption which states the conclusion. It states the conclusion of the renegotiating members who prepared the report. It says, "It is proposed that the regional board recommend to the Renegotiation Board that a clearance notice be issued."

Sometimes the renegotiator will put the caption in "Conclusion." This particular individual gave it a little different caption.

But uniformly the concluding language is in the terms of the recommendation coming from the renegotiator to the Regional Board, with the Regional Board recommending action [55] by the—that the Regional Board recommend action by the Statutory Board.

MR. SCHAUMBERG: I should like to identify that document as Exhibit 3a.

(Whereupon, the subject document was indicated to be Plaintiff's Exhibit 3a for Identification, but was not marked and was left in place in File No. 3.)

BY MR. SCHAUMBERG:

Q Would you go on, please, through the file?

THE WITNESS:

A Well, again there's the notice to the contractor that the Regional Board has recommended to the Renegotiation Board that the contractor be granted a clearance. And there is the memorandum to the Office of Accounting at headquarters addressed to the Office of Review, commenting on the Part 1(a).

MR. GOLDBLOOM: Did you say that was addressed—

THE WITNESS:

A These are uniformly addressed to the Office of Review.

MR. GOLDBLOOM: Addressed from one office—

THE WITNESS: —to another.

MR. GOLDBLOOM: —to another office, all right.

THE WITNESS:

A And then there is the Review of Determination, Office of Review.

BY MR. SCHAUMBERG:

Q Could you tell us what that contains, in terms of captions and content?

THE WITNESS:

A Well, it is the same as it was in the other case. It sets forth the renegotiable sales of the contractor, profits, also the non-renegotiable sales and profits. And at the bottom of this sheet there is a box that can be checked by the reviewer, and one that can be checked by the Director of the Office of Review, indicating concurrence for this agreement with the Regional Board recommendations.

And accompanying this sheet, and a part of it, really, is a short memorandum which is not signed, but which I assume in accordance with the usual practice was prepared by the reviewer, whose signature appears on the face sheet, in which he comments on the case and concludes that it is believed that no excessive profits were realized, and a clearance is recommended.

Q Are there captions on that document?

A "Business, profit margins, Government assistance, net worth, performance information, summary and recommendations."

[Whereupon, at 3:15 P.M. the deposition was recessed, to be reconvened at a later date.]

* * * *

[56] LAWRENCE E. HARTWIG,

having been previously sworn, testified as follows:

DIRECT EXAMINATION CONTINUED

BY MR. SCHAUMBERG:

Q Chairman Hartwig, on Page 49 of the transcript of Friday's hearing, we marked as Exhibit 2d the minute constituting the Board's action with regard to this File 2. That minute was not available on Friday. Is it available today?

THE WITNESS:

A (Nods head affirmatively)

MR. GOLDBLOOM: To make it clear, this is the second case about which the Chairman was referring.

BY MR. SCHAUMBERG:

Q Could you give us the date of that minute?

THE WITNESS:

A How did we identify the Exhibit 2? What purpose would that serve? That's what I don't understand.

Q For purposes of identification, the date would be useful.

MR. GOLDBLOOM: It's Page 45.

THE WITNESS:

A Well, I have the minute. The date is February 11, 1964.

BY MR. SCHAUMBERG:

Q And what does that minute reflect, generally?

[57] THE WITNESS:

A It states that the Board approved the clearances in the subject case.

Q Does it state the grounds for the clearance?

A It does not.

Q Would you be willing to read the text of the minute?

MR. GOLDBLOOM: I would object to the reading of the text, since those minutes are not matters of public record, nor need they be.

MR. SCHAUMBERG: I believe it's very clear under the Freedom of Information Act that the final vote is to be made available.

MR. GOLDBLOOM: You haven't any question about the final vote.

MR. GOLDBLOOM: I may not have asked for it today, Mr. Goldbloom, but we are under the Freedom of Information Act, which makes it clear that's a proper subject for public scrutiny.

MR. GOLDBLOOM: I appreciate that. And if you want to ask a question about the vote to the extent that the vote is represented in the minutes, I think the Chairman can answer. But that's not the question that you asked.

BY MR. SCHAUMBERG:

Q Would you please give us the vote on that particular matter?

[58] THE WITNESS:

A The vote was unanimous.

MR. SCHAUMBERG: On Friday, Mr. Goldbloom, you stated that you do not intend any of the exhibits to this deposition to be submitted along with the deposition. I would like to suggest that perhaps a more appropriate course of action would be to have all of those exhibits placed in an envelope, not necessarily for en camera inspection, but for submission along with the deposition, so that the District Court can make a determination, with those documents available to it, whether

they should be submitted for en camera inspection, so that we do not then have to come back to the Board to receive those documents.

MR. GOLDBLOOM: Well, as I explained for the record the other day, we are keeping a record of all the documents concerning which the Chairman is testifying, and those documents are available at the Board here in Washington, and will continue to be available to the extent that they are necessary for this case. But until there is an order from the Court, and as I understand the present posture of this case there is no such order that we have to submit the documents for in camera inspection, we object to their production or submission in any form unless and until we are so ordered by the Court. And for that matter, I would like to add that I see that as of now no basis has been [59] developed in the record for the submission of any of these documents for in camera inspection or otherwise.

MR. SCHAUMBERG: I think you know, Mr. Goldbloom that under the Federal Rules of Civil Procedure, when a deposition is ordered, when a subpoena duces tecum has been signed by the Court or has been approved by the Court, particularly over a motion to quash, that the exhibits to the deposition are ordinarily furnished to the other party.

MR. GOLDBLOOM: Yes.

MR. SCHAUMBERG: In this instance we have a subject with a peculiar situation, in that your client considers each and every document in its files confidential, but I don't think that that is sufficient grounds for shielding the Court from its right to look at these documents, to determine not only your motion for summary judgment, but also our motion for an order in accordance with the mandate.

MR. GOLDBLOOM: Responding to your statement: to begin with I should like to dispute and disagree with your gratuitous and erroneous interpretation of what the Board considers to be the availability of its documents in this case or otherwise. But secondly I also consider that this deposition is being taken pursuant to your motion for the production of documents, the hear-

ing that was conducted before Judge Corcoran in this case, and Judge Corcoran's order authorizing the taking of the deposition. I do not consider that this [60] case is an ordinary case, at this level, under the Federal Rules of Civil Procedure, in that we are attempting to determine his compliance with the mandate of the Court of Appeals.

The Federal Rules of Civil Procedure are available to me and to you as well, and should you decide to utilize them, that is your concern. I intend to rely upon them as they are available to me here, particularly in the context of the posture of this case.

MR. SCHAUMBERG: May I please have that read back? Because I did not understand what Mr. Goldbloom's point was.

(The record was read by the reporter)

MR. SCHAUMBRG: Well, that was a very long answer. I don't understand what was gratuitous or erroneous, as you said, Mr. Goldbloom. I stated that the Board considers all of the documents that we have discussed on Friday and are discussing today—

MR. GOLDBLOOM: I don't believe—

MR. SCHAUMBERG: —confidential, and it is for that reason that I am not, during the course of this hearing, permitted even to look at any one of them, and it is for that reason that these documents must be made available to the Court, so that the Court can determine what should or should not be made available.

MR. GOLDBLOOM: We will let the Court determine what documents should be made available.

[61] MR. SCHAUMBERG: It cannot, if it does not have the documents before it.

MR. GOLDBLOOM: I think it is a bit presumptuous of you, Mr. Schaumberg, to suggest that the Court can or cannot determine. You have the burden of showing the failure of compliance with the mandate of the Court of Appeals in this case, as far as I am concerned. Unless you can do that by testimony here, we are not willing to make available any of these papers unless we are so ordered. That's the short of it.

MR. SCHAUMBERG: Are you disregarding that portion of the legislative history which states that the Court and not the agency in question will determine what should be made available?

MR. GOLDBLOOM: I am not disregarding a thing, and I really think this is quite unprofitable for us to argue. I think you ought to be taking Mr. Hartwig's deposition.

MR. SCHAUMBERG: Let the record show, as I believe it does now, that every attempt has been made to have the exhibits to this deposition submitted to the court, along with the deposition, but that Defendants in this case are unwilling to do so.

MR. GOLDBLOOM: As far as the Defendant is concerned, the purpose of this deposition is, as stated in the Court's order, allowing for the deposition to be taken. Unless and until there is a requirement by the Court that we must submit [62] documents in camera or otherwise, we decline and respectfully refuse to do so.

BY MR. SCHAUMBERG:

Q Chairman Hartwig, on Friday we had moved on to what has been characterized as File 3, and you had described the so-called Report of Renegotiation, which has been marked as Exhibit 3a. Would you turn to that document again, please.

THE WITNESS:

A All right. I have it.

Q Can you tell us, either generally or specifically, if you will, who signed that report?

MR. GOLDBLOOM: I will object to a question which requires the specific identification of a signer of the report, by name. I think the Chairman can answer the type of person or the type of position held by the person who signed it in the Board structure, but I do object to the specific identification of the name of any individual who signed the report.

THE WITNESS: It was signed by a Regional Board member who prepared the report.

BY MR. SCHAUMBERG:

Q That is one of the five members of the Regional Board?

THE WITNESS:

A Yes. In this case he acted as a renegotiator. [63] You understand that some of the Regional Board members develop cases much as a renegotiator does.

Q Was the report approved by anyone?

A It was approved by the—well, the report?

Q Yes.

A The recommendation was approved by the Regional Board, and signed by the Chairman on behalf of the Regional Board as having been approved by the Regional Board.

Q Now, in terms of time, sir, was that approval concurrent with the preparation and signing of that report by the Board member who was also the negotiator?

MR. GOLDBLOOM: I am not certain that you have laid a foundation as to when the report was prepared. I would object to it unless there is some foundation.

BY MR. SCHAUMBERG:

Q Chairman Hartwig, could you tell us the date on which the report was prepared?

THE WITNESS:

A Prepared July 25, 1969.

Q Could you tell us the date that it was approved by the Chairman of the Regional Board?

A There's no date.

Q My question earlier, then, stands: can you tell us from your knowledge whether that approval would have been concurrent with the date of preparation?

[64] A Based on my general knowledge of the operation, I would say that the approval of the recommendation of the Board member followed in time the date of the preparation of the report. It would take time for the Regional Board to review the recommendation and approval of that recommendation to be given. That time

period varies, of course, with each case, depending on how much study each Board member has to give the case file, and the problems.

Q Does the signature on there of the Chairman of the Regional Board signify that the entire Regional Board approved that report?

A It does not indicate whether five Board members were present at the time the recommendation was approved, but under our procedure a quorum would have been present, at least.

Q Well, I believe that following the procedure that we were following on Friday, you were moving forward chronologically in that file to tell us what else it contained, omitting correspondence which would merely burden this record.

MR. GOLDBLOOM: Excuse me. For the sake of accuracy I certainly don't want to burden the record, but at the same time I don't want to make it appear that the file contains certain things and obviously does not contain others. So I would suggest to the Chairman that he go through a very [65] brief characterization of some of the documents in the file, even where they are not perhaps even important, but to show the nature of the processing of the case, because I think that this is what this is all about.

MR. SCHAUMBERG: That is satisfactory to me.

THE WITNESS:

A Well, the last document described in the file, I believe, was the Review of Determination of the Office of Review. Following that, the next document is the memorandum from the Office of Review to the Board. After that, a Notice of Clearance after Assignment issued by the Regional Board, and a letter to the contractor enclosing that Clearance Notice.

The file also contains performance reports. Then, in a separate package but also a part of the file, is the contractor's statement under the statutory factors—

MR. GOLDBLOOM: What does that mean? I am not sure I understand.

THE WITNESS:

A A contractor is invited by the Board to submit a statement of his on his own behalf with respect to the various statutory factors, such as character of his business, contribution to the defense effort, reasonableness of costs and profits, risk, capital factors, efficiency.

Then there are what appear to be accountant's work [66] papers, an annual report of the corporation, financial statements prepared by the firm of certified public accountants.

More drafts and work papers, a Federal Tax Return with schedules, State tax returns, reports to stockholders, and finally what appears to be an analysis of the profit experience under various contracts. That concludes the file.

BY MR. SCHAUMBERG:

Q Does that include the entire file for that contractor for that year?

THE WITNESS:

A Yes, sir. Except that there is also an assignment file in this case, as in every case that's assigned to the Region. We have such an example Friday, I think. But that is a separate file which is kept here at headquarters. This is known as the case file. The assignment file is not known as the case file.

Q Did the disposition of this case require statutory Board action?

A Yes.

Q And is there anything to indicate the nature or extent or form of that action?

A Well, again, the minutes would indicate the Board action, and in this case the minutes dated November 4, 1969 the Board unanimously approved the recommendation of clearance.

[67] Q Are you reading from an excerpt of the minutes?

A Yes. I am characterizing the minutes.

Q Is that all the minutes says—

A Well, there is a further point in this case, in that the contractor had taken issue with certain accounting matters, and the Board did not decide the contentions made by the contractors because of the small amount of dollars involved in the contentions, and so notified the contractor.

Q Is there anything to indicate in that minute the documents that were available to the various members of the Board in coming to the conclusion that there were no excessive profits?

A Well, there is a reference to the Review of Determination which had been submitted, and the recommendation of the Office of Review.

Q May we go back to those two documents, please?

A All right.

Q Now, w-en you say, and I quote "the review, the determination", which document do you mean?

A That is the document which I described in detail on Friday—

Q I believe you said—

A —which I believed I described on Page 56.

Q So that is just a sheet of paper, is that correct?

A That's a sheet, and there was a memorandum which [68] accompanied it. I described that memorandum also on the same page.

MR. SCHAUMBERG: For purposes of Identification, I should like to identify the document entitled "Review of Determination" as Exhibit 3b, and I should like to identify the attachment, which is the "Recommendation of the Office of Review", as Exhibit 3b and then put (1).

(Whereupon, the subject Review of Determination was indicated to be Plaintiff's Exhibit 3b for Identification but was not marked, and was left in place in File 3.)

(Whereupon, the subject Recommendation of the Office of Review was indicated to be Plaintiff's Exhibit 3b(1) for Identification, but was not marked, and was left in place in File 3.)

MR. SCHAUMBERG:

Q Does—

THE WITNESS: Well, just a minute. Would you read that back?

(The paragraph was read by the reporter.)

THE WITNESS: I don't know that I would make that distinction between the two documents. The first document is the Review of Determination. It also has a recommendation. As I noted Friday, there are boxes which are checked by the reviewer and by the Director of the Office of Review, indicating what their recommendation is.

[69] BY MR. SCHAUMBERG:

Q Well, on Friday, Mr. Chairman, we got as far as an identification by you on Page 56 of the transcript, where you said that accompanying the sheet which we have had identified as Exhibit 3b is a short memorandum which is not signed, and you stated that that memorandum comments on the case and concludes that it is believed that no excessive profits were realized. I then asked you whether there were captions on that documents, and your last answer of the day, I believe, contained those captions.

Now, I would like to go on from there and ask you—

THE WITNESS:

A Those are correct.

Q I would like to ask you what is contained under each one of those captions, starting with Business, in a general form as on Friday.

MR. GOLDBLOOM: I am not quite sure I understand the question. If you are really asking for a general characterization of what appears in the memorandum, in the most general terms, I wouldn't object. But I don't think the Chairman should answer—and I will direct him not to answer—to any specific statements that are set forth in this internal memorandum.

MR. SCHAUMBERG: I did not ask for any specific statements, Mr. Goldbloom.

[70] THE WITNESS:

A Well, Business discussed the character of the business very briefly. Profit Margins related to some margins realized on renegotiable contracts. Government Assistance set forth some figures. Net Worth set forth some computations. Performance Information, a brief reference to some of the performance data, and the final paragraph is a summary and recommendation. I believe I quoted from that, didn't I?

BY MR. SCHAUMBERG:

Q I believe you did.

THE WITNESS:

A Yes.

Q What is the length of that document?

A This is less than two pages, single-spaced.

Q Is there any reference on that document to the sosumed, Contribution to the Defense Effort, Capital Em-

A I think the captions refer you to the statutory factors.

Q I mean such factors such as Expense of Risk Assumged, Contribution to the Defense Effort, Capital Employed, Efficiency, and Reasonableness of Costs and Profits.

A Well, this memorandum does not purport to be a complete discussion of all of the statutory factors in this case.

Q Does it make reference to any other document?

[71] A No. Excuse me, please strike that. Well, it makes reference to the contractor's representations, which I take it are contained in the statement under the Factors. It makes reference to the performance report, which was issued by a procurement agency, and refers also to some other procurement information, which I assume was documented and is in the file somewhere.

Q Does it make reference to either Part 1a or Part 2 of the report of renegotiation? I believe in the file we went over Friday, File 2, there was such a reference. I was wondering if there was in this file.

MR. GOLDBLOOM: I object to that question. I think that's getting pretty specific. I think you've asked this witness, and I've allowed him to go on, to make a general statement about what is in the memorandum. But I think it is improper to question specifically about whether there are specific references to this memorandum or that memorandum contained in that specific document, about which he was referring. I think the witness has very clearly characterized the document for what it is, which is what I intended him to do. To go beyond that, I think is objectionable.

MR. SCHAUMBERG: While your objection is noted, Mr. Goldbloom, I think we are doing no more than piling generality on generality, because I have no idea of the content of any document to which we are referring. So if I ask you [72] if one document is referred to in another, I don't think you could say I'm getting specific.

MR. GOLDBLOOM: Well, I am stating, and I have said, that this witness is entitled to characterize these documents in general terms for what they are. These are, as we have made clear, in our papers, internal memoranda relating to the operations of the Renegotiation Board. These documents are in no way discoverable and they are subject to exemptions under the Freedom of Information Act. You are trying to characterize them or to have them deemed to be, certain types of documents which they are not. But we do not have to allow an examination of these documents by this witness in specific detail. I think you can get at the information you are seeking by asking questions about them, but I don't think that this witness need characterize them specifically.

BY MR. SCHAUMBERG:

Q I will ask the question once more, Chairman Hartwig: is there a reference in that document to the Report of Renegotiation?

MR. GOLDBLOOM: I object to that.

I would also show, for the record, that this witness has not as of now testified in any manner, shape or form

that the Renegotiation Board has adopted, made part of its statement, anything that is in that document. As far as the record shows now, it is simply an internal memorandum contain- [73] ing an analysis and commentary by a Board employee, and unless and until there is some demonstration that the Renegotiation Board has adopted that statement for any reason, there is no purpose or need to characterize it.

BY MR. SCHAUMBERG:

Q Chairman Hartwig, you were telling us, I believe that the documents which the Board had available to it when the Board approved the clearance recommended by the Regional Board were, I believe, the Review of Determination and the Recommendation of the Office of Review. Am I correct that the Report of Renegotiation was also part of the file that was made available to each individual Board member?

THE WITNESS:

A I assume that to be the case.

Q Is there any other document that was made available to each Board member?

A I assume in accordance with our ordinary practice that the Memorandum of the Office of Accounting to the Office of Review was also made available.

MR. SCHAUMBERG: I should like to mark that document as Exhibit 3c.

MR. GOLDBLOOM: Which document?

MR. SCHAUMBERG: The document to which the Chairman just referred.

MR. GOLDBLOOM: The Memorandum of the Office [74] of Accounting to the Office of Review.

(Whereupon, the Subject Memorandum was indicated to be Plaintiff's Exhibit 3c for identification, but was not marked, and was left in place in File 3.)

MR. SCHAUMBERG: I should liked to have marked as Exhibit 3d the minute which reflects the Board's action in this case.

(Whereupon, the Subject Minute was indicated to be Plaintiff's Exhibit 3d for Identification, but was not marked, and was not yet located.)

BY MR. SCHAUMBERG:

Q Chairman Hartwig, Section 1473.2 of the Board's regulations provide, and I quote, "When a Regional Board determines in a Class A Case that the contractor has not realized excessive profits for the fiscal year under review, the Regional Board will notify the Board of the Regional Board's determination, and submit a report of the case to the Board."

Could you tell us which if any of the documents which we have described constitute that report which the Regional Board made available to the Statutory Board?

THE WITNESS:

A That's the Report of Renegotiation.

Q That is the same document, in other words, as is forwarded to the Statutory Board?

A Yes.

Q Is it at that point that it is approved by the [75] Regional Board?

MR. GOLDBLOOM: Objection. I don't think that the Chairman has stated that it is approved.

BY MR. SCHAUMBERG:

Q Referring to your earlier testimony, Chairman Hartwig, you said that the signature of the Chairman of the Regional Board on the Report of Renegotiation signified that that report was approved by the entire Regional Board.

MR. GOLDBLOOM: I don't think the Chairman—the Chairman did not so testify.

THE WITNESS:

A I didn't say that.

MR. GOLDBLOOM: Excuse me, Mr. Chairman. As I recall the Chairman's testimony, the Chairman testified —and the record of course will speak for itself—that the recommendation was approved, and not the report.

THE WITNESS:

A That is correct. And I believe I read into the record the language of the report which was signed by the Regional Board member. It concluded: "It is proposed that the Western Regional Board recommend to the Renegotiation Board that a clearance notice be issued."

Now, it was that recommendation which was approved.

BY MR. SCHAUMBERG:

Q And how is that signified?

[76] THE WITNESS:

A It is signified by the Board minute.

Q Now, excuse me. I am talking about, how it is signified that the recommendation of the renegotiator is adopted or approved or whatever the right word is, by the Regional Board for recommendation to the Statutory Board?

A There is a Regional Board minute.

Q Do you have that Regional Board minute available to you?

A Not in this particular case.

Q I would think that since we have asked for these files to be available, that that minute should be available.

A That minute is not a part of this file, you understand.

Q I believe that you testified that the signature—

A Excuse me. Hold it.

Q Excuse me. Let me finish my sentence, please.

MR. GOLDBLOOM: Wait a minute. I think the witness may want to add to his last . . .

THE WITNESS: I want to correct myself. An excerpt from the minute is in the file.

BY MR. SCHAUMBERG:

Q Could you tell us what the gist of that excerpt is?

THE WITNESS:

[77] A "The Board made a final recommendation that the contractors did not realize excessive profits. And recommended that a clearance notice be issued."

Q And did the Chairman of the Regional Board then sign the Report of Renegotiation?

A Well, his signature indicates that the recommendation of the renegotiator was approved by the Regional Board.

Q And then that becomes the Report of the Regional Board to the Statutory Board, is that correct, pursuant to regulation 1473.2?

A It is not approved by the Regional Board. It is simply a report which is submitted to headquarters. The minute speaks for itself.

Q So does the signature on the bottom of the report.

MR. GOLDBLOOM: I am not sure what that reference is, counsel. I think the Chairman has quite clearly stated what the signature represents, and I think if you are going to ask questions of the witness you should ask them and keep your references and your comments to yourself.

BY MR. SCHAUMBERG:

Q Could you tell me where in that file the comparitive analysis required by the Board's regulations under Part 1460 is made, whereby the contractor's performance is compared with the performance or the "prices, costs, and profits of other contractors engaged in the same or similar [78] products, or using the same or similar processes."—

MR. GOLDBLOOM: I object to the question because there is no showing that any such comparison is required.

BY MR. SCHAUMBERG:

Q I would like to refer you, Mr. Hartwig, to Section 1460.2(c) of the Board's regulations, which states as

follows, and I quote: "In evaluating the contractor's performance, a comparison"—and now I would like to underline the next three words—"will be made with the prices, costs, and profits of other contractors engaged in the production of the same or similar products or using the same or similar practices."

MR. GOLDBLOOM: Do you have a question?

MR. SCHAUMBERG: That is the one you objected to, Mr. Goldbloom.

MR. GOLDBLOOM: I continue my objection. I raise it again. There is no showing on the basis of your question that this regulation says that certain comparisons are required. I think you have taken a statement of a regulation entirely out of context, and have not demonstrated there any requirement that the Board has promised to make a comparison or has directed that one shall be made.

BY MR. SCHAUMBERG:

Q Chairman Hartwig, is it your understanding that your regulations indicate that a comparison will be made of the [79] nature provided in the regulations?

THE WITNESS:

A Not in every case.

Q In which cases is it made, Mr. Chairman?

A When it is deemed necessary.

Q And when is that?

A —when it is feasible.

Q And when is that, sir?

A Well, we are getting into a very broad area at this point.

MR. GOLDBLOOM: I would like to object to that, to continuing this line of inquiry, unless counsel can explain to me on what basis he can demonstrate that this will show what is a final opinion or not of the Renegotiation Board. It seems to me that you are pressing the witness here concerning Board proceedings which have absolutely nothing to do with whether the Board has or has not issued an opinion in a given case.

MR. SCHAUMBERG: In response to your question, Mr. Goldbloom, the Attorney General has stated that—and I don't pretend to quote him, but in general that—in order for the public to understand what an agency is doing, it must understand the principles under which that agency is operating. Now, this member of the public at this point has available to him only the Board's regulations, and the [80] Board's regulations in Part 1460, which is called incidentally "Principles and Factors" in determining excessive profits."

Would you read that back?

(The record was read by the reporter)

MR. SCHAUMBERG: —shows that the Board engages is, and I quote, "general considerations", and in specific considerations, in determining whether there are excessive profits.

Now, under the heading 1460.2, Specific Considerations, the paragraph concerning the comparisons is contained. Now, I think it is very much to the point if the public is to have some understanding of how the Board operates, to know when, if ever, and where the Board considers these comparisons that it explains in its regulations. And it does not state in those regulations that those comparisons are only made once in awhile. It states that they will be made. And I am trying to determine where those comparisons are made, so that the public will, as a result of the Freedom of Information Act, have some understanding of this Board's operation.

MR. GOLDBLOOM: All right. The question you raised may or may not be a very interesting question, but it is completely outside the purpose and scope of the taking of this deposition, which is mainly to find out what is a final opinion of the Renegotiation Board. Whether or not the Board has made certain comparisons, and whether it has given special consideration to various factors, which are outlined in its [81] regulations, is and may be an interesting question. I don't think it is before the Court in this case and I don't think it is encompassed within the purview of what the deposition should be designed to elicit.

This is not a deposition which examines into the entire scope of the Board's processes and how it manages its cases. You may find this an interesting endeavor, Mr. Schaumberg, but I do not. I have better things to do with my time. I think the question is, here, whether or not the Renegotiation Board has complied with the mandate of the Court of Appeals in furnishing to you the opinions, final opinions and orders, as called for by its mandate. In our view, we have done that fully in this case. And to the extent that you are finding—trying to find out that that has not been complied with, I think you are entitled to ask questions, but other questions concerning the nature of Board processes have no part in this case.

MR. SCHAUMBERG: Well, Mr. Goldbloom, before you continue this line of objection—while I know you have read it before—like to make you immediately familiar with the Court's language in ordering that this deposition take place. It says, "The deposition of Chairman Hartwig should be an aid in determining what constitutes a Board opinion."

Now, if every time I ask questions—and I find your objections today to be somewhat different and more extensive [82] and more exclusive than they were on Friday—if you object every time to questions which I think approach the question of what constitutes a Board opinion, I suppose that you are acting—or at least taking the chance of acting—contrary to the Court's order, and whatever remedies are appropriate in this case will be meted out by the court, I assume.

MR. GOLDBLOOM: I have no intention of operating in any manner contrary to the Court's order. As far as I am concerned you are entitled to find out to what extent the Board has issued a final opinion and has adopted it or made it a part of its file. To the extent that this is available to you I think that you are entitled to raise these questions. But when it comes to attempting to find out what are the contents of internal memoranda prepared by subordinate Board employees, I intend to object, and not to allow this witness to answer. What is

the contents of these memoranda is not a part of this case.

MR. SCHAUMBERG: And as I understand it, you are coupling that comment with your refusal to make these documents available to the court so that it can make that determination?

MR. GOLDBLOOM: I have explained why I do not intend to make them available, because I do not think the Court has requested them.

MR. SCHAUMBERG: So your position is that I can neither ask about them nor make them available to the Court, is that [83] right?

MR. GOLDBLOOM: You can ask any questions you like. It is your right. I intend to make my objections where they are available to me.

BY MR. SCHAUMBERG:

Q Chairman Hartwig, would you say that the two files, Nos. 2 and 3, that we have gone over Friday afternoon and this afternoon, are characteristic of the 30-some files that are the subject of this deposition with regard to the manner in which the determination is reached that the contractor should be cleared? Or is it possible that there are, if by examining you on others, other files, we will find that there are many exceptions, there are many different ways in which the Board arrives at this conclusion—

THE WITNESS: Those two files—refresh my recollection—were Class A Cases where the Regional Board recommended a clearance and the Statutory Board approved a clearance?

Q Do you know if—

A Excuse me.

Q Excuse me.

A I think so far as the procedure is concerned, these are representative. There are some clearance cases, of course, where because of the nature of the case a short form is prepared. A Part 2 is not prepared in some clearance cases in the Region.

[84] MR. GOLDBLOOM: Part 2 of what?

THE WITNESS:

A Part 2 of the Report of Renegotiation. It's a short-form clearance, where, let us say, the case was assigned to the Region to explore accounting questions, and once the accounting questions have been settled to the satisfaction of the Board, the profits are such that a lengthy evaluation of the statutory factors is not required.

BY MR. SCHAUMBERG:

Q Have you finished?

THE WITNESS:

A (nods head affirmatively)

Q Can you tell me whether in any of the Clearances after Assignment that are the subject of this deposition, if there was a recommendation by the Regional Board that there were excessive profits, but that a clearance was ordered by the Statutory Board?

THE WITNESS: Let us go off the record.

(Whereupon, a short discussion was held off the record.)

THE WITNESS: Let us go back on the record.

MR. SCHAUMBERG: Will you please, Miss Reporter, restate the last question?

(The pending question was read by the reporter.)

THE WITNESS:

A I don't know of any.

[85] BY MR. SCHAUMBERG:

Q I noticed during the pause, Chairman Hartwig, that I was furnished with one order which was titled, Notice of Clearance after Reassignment. Could you please take that file and just explain to me what the reason was for the different form of order?

THE WITNESS:

A The different form of order?

Q Different form of order in the sense that other documents were either "Clearance after Assignment" or

"Clearance without Assignment." This was the only one that said "Clearance after Reassignment." I just want to understand what that means.

THE WITNESS: Let us go off the record.

(Whereupon, a short discussion was held off the record.)

THE WITNESS: Let us go back on the record.

A I have before me a Notice of Clearance after Reassignment, and that apparently was a case where the Board reassigned the case to headquarters for some reason that is not apparent to me from the Notice, and after consideration of the case here at headquarters it was decided to issue a Notice of Clearance after Reassignment. Now, in the usual case where the Regional Board recommends a clearance in a Class A case, it is not reassigned to the headquarters Board. It is reviewed here but not reassigned here. Reassign- [86] ment may occur—speaking in general terms, now—I don't know what the effect of this case is—where the headquarters staff may want more time to explore questions.

In some cases, the recommended clearance may be questioned at headquarters to the extent that a Division is appointed, the Division then will meet with the contractor, much as it does in the refund case, to explore questions with the contractor. Then finally they will decide that a clearance is appropriate. In such a case a Notice of Clearance after Reassignment would be the document. That Notice would go forward from headquarters. The effect of the reassignment is to bring the proceedings up to headquarters.

Q In as much as this seems to be the one file that differs, at least in a limited extent, from the other two that we have gone through, I would like to designate this as File 4, and, keeping Mr. Goldbloom's comment in mind that he would like to have the substance of the file in the record in its entirety, could you quickly go through that file in chronological order and tell us what the documents are that are contained in it?

A Well, the first document is the RB1, the contractor's filing, with a letter enclosing that filing and two copies of the annual report of the contractor.

The next is notice to the contractor that the case has been classified as Class A and assigned to the Regional Board.

[87] Next, a form checking various questions which the contractor is asked to answer.

The contractor's reply.

A letter asking more questions.

Memorandum of a telephone conversation with the contractor—actually three telephone calls.

A document containing information which the contractor supplied in response to the request from the Regional Board.

An accounting memorandum from the Director of Accounting to the Regional Board, to the Chairman of that Board.

A Minute of the Regional Board, approving a certain accounting item—

Q Excuse me, is that a minute of the Regional Board?

A Yes.

A memorandum of a telephone conversation.

Another memorandum of another telephone call. Still another memorandum of a telephone conversation.

A contractor's submission of certain data.

A memorandum of a telephone conversation.

What apppears to be an accountant's work paper.

Some newspaper clippings—

MR. GOLDBLOOM: Can you hold that for a moment? I've got to make an important phone call?

(Whereupon, a very short recess was taken.)

[88] MR. GOLDBLOOM: All right.

THE WITNESS:

A Next is the report of renegotiation, which concludes: "Accordingly, the Regional Board is requested to recommend to the Renegotiation Board that a clearance notice be issued to the contractor—"

BY MR. SCHAUMBERG:

Q Could you tell us—

THE WITNESS:

A "—for the year in qeustion."

Q Could you tell us who signed that?

A It is signed by a Regional Board member, who acted as the renegotiator.

Q Is there any other signature on that?

A It is also signed by the Chairman, and the legend about his signature is, "final recommendation approved by the Regional Board."

Q Could you tell us what the headings are, or the captions are, on that final report?

A Well, the usual captions of a renegotiation report.

Q Are they the same in every instance?

A No, the organization of these reports vary. It is not stereotyped. But generally speaking there is a similarity. For example, again there is a section on Sources of Information, and then Application of Statutory Factors, Char- [89] acter of Business, Reasonableness of Costs and Profits, Extent of Risk Assumed, Contribution to the Defense Effort, Capital Employed, Efficiency of the Contractor, Determination of Excessive Profits, Proposed Settlement.

These are not stereotyped headings, but—and they vary a little bit from one region to another—but in substance they are the same.

Then, the next document is a letter notifying the contractor that the Renegotiation Board has made a final recommendation, "that you have not realized excessive profits." The same form letter that I have quoted in the other cases. It states, "The Renegotiation Board has been notified of our file recommendation in your case, and will decide whether or not it is in accord therewith. If it is in accord, then a clearance will be issued to you."

Next is a schedule of some accounting data in that case.

Next is a form transmitting the renegotiation report and a complete case file to headquarters.

Then a tax return.

Memorandum of telephone call.

Memorandum from the Office of Review at Headquarters to the Directors, Division of Accounting and the Regional Board, requesting additional accounting data.

A letter to the contractor requesting additional [90] accounting data. That letter is issued by the Director of Accounting in the Regional Board.

Next is Notice to the contractor that the case has been reassigned.

Q Is this a form notice?

A Yes.

Q Does it state the reason for the reassignment?

A It does not. It simply states that the case has been reassigned and "that the Director of the Office of Review will communicate with you with respect to further proceedings."

Now, this is a form that would be used in a case of this kind where the headquarters review discloses the need for more information.

The next is a document supplying the data requested.

MR. GOLDBLOOM: Is that from the contractor?

THE WITNESS:

A The contractor. This is simply a form, an internal document of the Office of Assignments indicating that the case was reassigned.

Next is a document entitled "Reassignment Transmittal," an internal form.

Then a memorandum of telephone conversation between the contractor and the Regional Accountant.

Memorandum of the Office of Review addressed to the —excuse me. Strike that. Memorandum of the Office of [91] Accounting, addressed to the Office of Review, discussing the Part 1(a).

Review of determination, Office of Review, with accompanying memorandum which is unsigned—no. Excuse me. The memorandum is addressed by the Reviewer to the accounting director of the Office of Review, and that memorandum accompanied the Review of Determination of the Office of Review.

Next is a memorandum reciting that the case has been reassigned and that a clearance—that the Regional Boards' clearance recommendation is appropriate.

Next is the notice of clearance after reassignment.

BY MR. SCHAUMBERG:

Q Is there also a minute which relates the Board's action?

THE WITNESS:

A Following the notice of clearance after reassignment in this file is a notice, or rather a letter, from the Secretary of the Board to the contractor, stating that "after further study the Board has concluded that additional proceedings will not be necessary and have determined that you realized no excessive profits. Accordingly there is forwarded herewith the Clearance Notice formally embodying that determination."

Now a copy of the Notice of Clearance after Reassignment.

[92] Another copy of the Secretary's letter to the contractor.

Q Do you have available the minutes of the Board's actions?

A I think so.

MR. SCHAUMBERG: Well, for purposes of identification, since this has been designated as File 4, I should like to designate the Report of Renegotiation as Exhibit 4a.

(Whereupon, the subject Report of Renegotiation was indicated to be Plaintiff's Exhibit No. 4a for Identification, but was not marked and was left in place in File No. 4.)

MR. SCHAUMBERG: I should like to designate the Review of Determination as Exhibit 4b and the accompanying memorandum as Exhibit 4b(1).

(Whereupon, the subject Review of Determination and the accompanying memorandum were indicated to be Plaintiff's Exhibit Nos. 4b and 4b(1), re-

spectively, for identification, but were not marked and were left in place in File No. 4.)

BY MR. SCHAUMBERG:

Q I did not hear you mention an accounting memorandum. Perhaps I missed that. Did you mention a memorandum from the Office of Review to the Director of the Office of Accounting of the Regional Board?

THE WITNESS:

A There also was a memorandum of the Office of Accounting to the Office of Review commenting on the Part 1a.

[93] MR. SCHAUMBERG: I should like to designate that document as Exhibit 4c.

(Whereupon, the subject memorandum was indicated to be Plaintiff's Exhibit No. 4c for Identification, but was not marked and was left in place in File No. 4.)

THE WITNESS:

A May I say that this reassignment is what we call internally a technical reassignment. This occurs when, typically, the Office of Accounting feels that some accounting data has not been fully explored in the Part 1a, and because it may necessitate further communication with the contractor or a delay in the review of the case here, the Board effects what we can call a technical reassignment. It doesn't mean that at that particular time the Board does or does not say that there is a possibility of excessive profits. It hasn't passed on that question. All it has decided is that there's a need for further information.

BY MR. SCHAUMBERG:

Q Do you have available to you now the minutes of the Board's action?

THE WITNESS:

A In this case there was a Division Report and recommendation, together with the Review of Deter-

mination prepared by the Office of Review, and the Board approved the recommendation, the Division recommendation, and determined that [94] this contractor realized no excessive profits. It directed that a clearance notice be issued.

MR. SCHAUMBERG: May I have that answer read back, please?

(The record was read by the reporter.)

MR. SCHAUMBERG: First of all, I should like to designate that minute as Exhibit 4d.

(Whereupon, the subject minute was indicated to be Plaintiff's Exhibit No. 4d for Identification, but was not marked and was left in place in File No. 4.)

BY MR. SCHAUMBERG:

Q Additionally, I should like to ask you whether that reference to a Division Report in the minute is a reference to a document that you had previously mentioned—

THE WITNESS:

A Yes.

Q —or whether this is a different document?

A There was a Division Report, and that document in the file follows the Office of—Review of Determination, Office of Review.

Q Could you tell us in general what that Division Report encompasses?

A It simply recites the reasons for reassignment, and that the accounting questions have been satisfactorily resolved, and concludes with the recommendation that the case [95] be later closed by clearance notice.

MR. SCHAUMBERG: I should like to designate that document as Exhibit 4e.

(Whereupon, the subject Division Report was indicated to be Plaintiff's Exhibit No. 4e for Identification, but was not marked, and was left in place in File No. 4.)

BY MR. SCHAUMBERG:

Q In the documents which were made available under cover of letter of June 18, 1970, there were two orders determining excessive profits.

THE WITNESS: Wait a minute. Let us go off the record.

(Whereupon, a short discussion was held off the record.)

THE WITNESS: Let us go back on the record.

BY MR. SCHAUMBERG:

Q Do you wish to add something to your description of File No. 4?

THE WITNESS:

A Yes. Also included in the file are performance reports and procurement information.

Q Thank you. As I was saying, there were two orders determining excessive profits. I should like to ask you to place before you either one of those two files.

A All right.

Q Chairman Hartwig, I would like to ask you to go through that file in chronological order, as quickly as [96] possible but including all of the relevant as well as other documents to complete the final picture of the file.

A First is the contractor's filing.

Then a document listing the major prime and subcontract sales contract numbers.

Various memoranda of telephone calls.

A request for accounting information.

Telephone call.

The contractors submit certain cost data, followed by more extensive submission of cost data, a memorandum of telephone call.

Computation of contract costs and profits.

Regional Board minute approving the allowance of a certain cost item.

Memorandum setting forth sales made by subsidiaries of the contractor.

Memoranda of telephone calls.

Memorandum director of Accounting Division, addressed to the contractor, asking for financial and accounting data.

Work papers, more memoranda of telephone calls, tax data.

Report of renegotiation.

Q Can you give us an item-by-item description, please, of the Report of Renegotiation?

MR. GOLDBLOOM: As long as it is a very general [97] description of the report, I would have no objections.

THE WITNESS: Captions?

MR. GOLDBLOOM: That's fine.

THE WITNESS:

A Well, Part 2, first caption: Sources of Information. Then, Applicable—

MR. GOLDBLOOM: Excuse me for a moment: why don't we start at Part 1?

THE WITNESS:

A All right. Part 1a is the accounting section. Name and address of contractor and their affiliation, stock ownership, affiliated related companies, business of contractor, affiliated or related companies, business of contractor—and, under Business of Contractor, character of operations: normal, commercial, business.

Principal renegotiable products and sales.

Tabulation of the number of products delivered, sales and profits before Federal Taxes. Summary of operations before renegotiation. A tally setting out current and prior renegotiation data. Description of plans, accounting methods, accounting methods for tax purposes, accounting systems, method of reporting income and costing sales by type of contract.

Notation that the contractor has filed the copy of the Federal Income Tax Returns and a copy of its annual report [98] to stockholders. The heading Segregation of Sales and Allocation of Costs and Expenses. Under that, Segregation of Sales or Buildings, Net. Allocation of Costs and Expenses. Acceptability.

Then, Cost of goods sold. Under that, a summary.

Another heading, Material and Subcontracting. Under that, Relationship to Cost of Sales. Direct Labor, Factory Overhead, Inventory. Selling and Advertising. General and Administrative Expenses. Compensation to Officers and to Others.

A discussion of pensions, retirement plans, contributions, etcetera. Other income and expense items.

Then, there is a heading Income on a Federal Tax Basis. Under that Reconciliation from book to tax basis, with a lengthy tabulation. A heading, Taxable Income. Another Heading, Latest Taxable Year Examined. State Taxes.

Then, under Capital: Assets Furnished. Amount of Customer-Furnished Material not recorded in books, Progress Payments. Return on Net Worth and Capital Employed, Price Record by Type of Contracts. Current Status of certain price-redeterminable contracts.

Research and developments. And then the Schedule A which is a statement of income separated as to renegotiable and non-renegotiable business, with the various schedules.

Comparative statement of profit or loss, per contractor's [99] books, Comparative Schedule of Factory Overhead, Comparative Schedule of G and A Expense. Comparative Balance Sheet.

MR. GOLDBLOOM: Excuse me. When you say "comparative" does it mean compared in what way?

THE WITNESS:

A By years.

MR. GOLDBLOOM: For this contract?

THE WITNESS:

A For this contract, yes.

Then, details as to sales costs and earnings, with respect to certain contracts, with many schedules, with a summary per schedule A, and tax returns.

Then some data with respect to non-renegotiable contracts.

BY MR. SCHAUMBERG:

Q Chairman Hartwig, is the accounting section of the Report of Renegotiation made available to the contractor?

THE WITNESS:

A It is.

Q Could you tell me, first of all, what is the purpose in developing this report, and then, what is the purpose of making it available to the contractor?

A The report is developed and made available to the contractor so that he may have an opportunity to take exception to any adjustments which the accountants have made.

[100] Q And why is it, why is the report prepared in the first place by the Board?

A It is necessary to prepare the report in order to establish the proper amount of renegotiable sales, the proper amount of renegotiable expenses, and renegotiable profits.

Q Would you now go on to the Part 2 of the Report of Renegotiation, and please give us those captions.

A Oh, the Report of Renegotiation? A. Sources of Information. B., Application of Statutory Factors. Under that, Character of Business, Reasonableness of Costs and Profit.

Under another subheading, Costs and another subheading Profit.

Extent of Risk Assumed, Contribution to the Defense Effort, Capital Employed, Efficiency of Contractor, Determination of Excessive Profits, Proposed Settlement.

MR. SCHAUMBERG: Let us go off the record just a second.

(Whereupon, a short discussion was held off the record.)

BY MR. SCHAUMBERG:

Q Is there any place on that Report of Negotiation where there is a comparison made with other contractors?

MR. GOLDBLOOM: I object to the question as being irrelevant and for the same reasons as I stated in objecting to a prior question of similar nature.

THE WITNESS:

[101] A (Resuming description of items in file:) The documents are a little bit out of order here, I think. The next document is a memorandum, Office of Accounting and Headquarters, addressed to the Office of Review, commenting on the Part 1a.

A letter to the contractor from the Secretary to the headquarters Board, stating that the case has been reassigned from the Regional Board to the Renegotiation Board for further study.

A memorandum of general counsel addressed to the Board discussing a legal question with respect to a certain type of contract.

A memorandum by an employee of the Office of Review addressed to the reviewer, reporting on a discussion he had with the contracting officer with respect to a certain contract.

A letter to the contractor from the Director, Division of Accounting in the Eastern Board, asking for some further contract sales and cost data.

Well, a letter from the contractor.

Memorandum of telephone call. Memorandum of Office of Accounting for the file.

Memorandum of the Office of Accounting addressed to the Office of Review, supplementing its earlier accounting review memorandum.

Review of Determination, Office Of Review, and accompany- [102] ing that a memorandum prepared by a reviewer in that office, and addressed to the Deputy Director.

BY MR. SCHAUMBERG:

Q Could you tell us what the captions on that document are?

THE WITNESS:

A Of the memorandum?

Q Yes . . .

A Business, Costs and Expenses, Government Assistance, Net Worth, Performance Information, Statutory

Factors: under that, D region, subheading This Writer, Conclusion and Recommendation.

There is also a memorandum of the Director, Office of Review, which accompanied the Review of Determination.

Q You say a memorandum, or just a covering letter?

A Memorandum.

Q Is that a substantive document in that it covers some of the factors as the memorandum itself?

A No, I think it's addressed primarily to a procedural problem.

Various memos relating to their procurement data.

A supplementary memorandum prepared by the reviewer.

Q Does that cover various factors, statutory-type factors?

A This relates primarily to obtaining the complete [103] and final results of certain contracts that had not been settled.

Another memorandum on the same subject, prepared by another employee.

A letter to the contractor from the Division Chairman, referring to certain adjustments in the figures.

Memorandum of telephone conversations.

Memorandum to the Division by the Division Chairman.

Memoranda of telephone conversations.

A letter from the contractor enclosing information.

Memorandum of conference with the contractor by staff personnel.

MR. GOLDBLOOM: Excuse me. Could you just repeat that?

(The record was repeated by the reporter.)

MR. GOLDBLOOM: Thank you.

THE WITNESS:

A A notice of points for presentation, addressed to the contractor.

Various documents relating to extension of time for the hearing with the Division.

Memorandum of the Chairman of the Division to members of the Division.

BY MR. SCHAUMBERG:

Q Could you tell us what the gist of that kind of memorandum is?

[104] MR. GOLDBLOOM: In general words. In other words, let me make myself clear: I would object if you are seeking to find out what is in that memorandum. I think the Chairman is entitled to give it a most general description and I am not going to tell him how to describe it. It is not my affair. But I think a memorandum which on its face, at least as of now, appears to be nothing more than an internal memorandum doesn't need anything more than the most general characterization.

THE WITNESS:

A Well, it discusses the request for postponement of the meeting of the Division.

A revised Schedule A.

BY MR. SCHAUMBERG:

Q Schedule A of what, sir?

THE WITNESS:

A Of Part 1a.

A report of a plant visit.

A memorandum of telephone conversation. Still another memorandum of a telephone conversation.

A memorandum from the reviewer to the Director, Office of Review, analyzing the case on the basis of new information.

MR. GOLDBLOOM: I'm sorry. You say new information?

THE WITNESS:

A New information.

[105] A letter from the contractor to the Division Chairman.

A memorandum setting forth the informal minutes of the meeting with the contractor held by the Division and prepared by an employee of the Office of Review.

BY MR. SCHAUMBERG:

Q Does that document have captions on it?

THE WITNESS:

A No captions. It's called "Minutes of Meeting." This is the report and recommendation of the division.

Q Does that document have captions?

A Memorandum to the Renegotiation Board, and it has captions: Statutory Factors. Under that, Character of Business, Extent of Risk Assumed, Efficiency, Reasonableness of Costs and Profits. Under that, Costs, Profits. Capital Employed, Contribution to the Defense Effort, Conclusion.

This report denotes the view of the majority of the Division. One member of the Division did not conclude it.

A letter to the contractor from the Secretary to the Board, informing the contractor of the Board's determination and asking the contractor to let the Board know not later than a certain date whether he wishes to enter into a bilateral agreement, or whether the Board should proceed to issue a unilateral order.

A letter from the contractor stating that it has submitted all of the evidence which it believes to be relevant, [106] and requesting a written summary of the facts and reasons upon which a decision is based, in order to assist the contractor to determine whether or not it will enter into an agreement.

Next is the summary of facts and reasons.

Q Does that have any captions.

A Yes. It starts out, I Determination.

II, Introduction.

III, Statutory Factors. Under that it has Extent of Risk Assumed, Character of Business, Efficiency, Reasonablness of Costs and Profits. Under that, Costs, Profits. Contribution to the Defense Effort. Conclusion.

Q IV is Conclusion?

A No.

Q Okay. Thank you.

A The last Roman Numeral was III, Statutory Factors. Correspondence with respect to State tax credit.

Letter from contractor to the Board stating that it can't accept the determination of excessive profits.

Q Is that "cannot"?

A Cannot. Accordingly they are unwilling to enter into an agreement for the refund.

Then there is the order determining excessive profit, and the notice of order determining excessive profit.

Correspondence with respect to tax credit.

Memorandum of the Office of Accounting, discussing cost [107] and adjustments.

The file also includes performance data.

The subcontract report, accountant's work papers, and excerpts from a Congressional Hearing.

Q Is that the entire file?

A That's the entire file, with the exception of the assignment file.

Q And I trust also with the exception of the Board's minutes?

A And the Board's minutes.

Q Do you have the Board's minutes available?

MR. GOLDBLOOM: Let me see what file that is.

BY MR. SCHAUMBERG:

Q Perhaps in this case there would be more than one Board minute and perhaps there would not. Could you tell us how many there are?

THE WITNESS:

A There is only one Board minute, and it recites that the Division Chairman presented the report and recommendation on behalf of himself and another Board member in connection with the proposed Board determination of the Regional Board.

The Board, by a majority vote, approved the Division's recommendation and determined that the contractor realized excessive profits in a certain amount. Two Board members dissented.

[108] The minute further states that a copy of the Schedule A as revised will be furnished to the contractor.

Q When you read from that, "the Chairman", does that mean the Chairman of the Division?

A Yes.

Q Or did that mean you?

A The Chairman of the Division.

Q Was there a statement of fact and reasons issued in this case?

A I don't think in this case the contractor requested a Statement of Facts and Reasons, and therefore none was issued.

Q Was there a subsequent summary prepared to the one that you just mentioned, or was there only one summary of Facts and Reasons?

A Only one Summary of Facts and Reasons, to my knowledge.

Q Was there any change made in that actual summary after it was prepared?

A You mean after it was approved and issued to the contractor?

Q Yes, sir.

A Not to my knowledge.

Q Is there a document in this file that constitutes a final exposition of the Board's case?

[109] A There is a document in the file which, in my judgement, constitutes the Board's exposition of the case, namely the Summary of Facts and Reasons. But as you know, it is our position that the Summary is not a final exposition, because the Board's determination and the Summary are subject to change.

Q Was it changed in this case, sir?

A In this case it was not changed.

Q In that case, was the summary not the final exposition of this case?

MR. GOLDBLOOM: That's a legal question. I think the Chairman has answered your question as to which documents were prepared in conjunction with the time factors involved and the determinations made; but whether or not something is a final opinion or not is a matter of law. I do not think that this witness need answer.

MR. SCHAUMBERG: I beg to differ with you, Mr. Goldbloom. The Chairman testified that this document does not constitute a final exposition of the Board's view because it is subject to change. My question was whether this document was so changed, and the Chairman said it was not.

MR. GOLDBLOOM: That is correct.

MR. SCHAUMBERG: So I am restating the question in light of his subsequent answer that this document was not changed.

THE WITNESS:

[110] A I think the Board's position is—

MR. GOLDBLOOM: Excuse me. The Board's position is made clear and the Chairman's statements are made clear. This document was not changed, as the Chairman has testified. Whether or not it is a final opinion within the meaning of the Freedom of Information Act is a legal question which this witness need not respond to.

MR. SCHAUMBERG: I did not ask him that question.

MR. GOLDBLOOM: Oh. I understood that that was the question.

MR. SCHAUMBERG: No. The question was whether that was the final exposition of the Board's view of the case, which is the language used by the Chairman in his affidavit. And I am asking, I am cross-examining the Chairman on his affidavit at this point.

BY MR. SCHAUMBERG:

Q You state in Paragraph 4 of your adffiadvit, and I quote, "A summary, unlike a statement, is not a final exposition of the Board's view of the case."

The affidavit speaks in general terms. I am now asking you about a specific summary, and asking you whether that summary constitutes the final exposition of the Board's view of this case.

THE WITNESS:

A What date is that affidavit. There are two affi-[111] davits.

Q The date on this affidavit is—

A June 23?

Q June 23, 1970. Paragraph 4 is the one I was reading from.

A Well, I don't know whether this is responsive to your question, but: first, I don't think I can improve upon the statement made in the affidavit. And secondly, I don't think that I could testify that, had a statement of facts and reasons been requested, it would have been the same as the summary.

Q I understand that, but what I am asking you is a somewhat different question, and that is: on the record that is available to us—and that includes the entire file that you have before you—does not this summary constitute the final exposition of the Board's view of the case?

MR. GOLDBLOOM: Objection. The Chairman has testified that this was the last document that was prepared and submitted, the last action, position, or whatever the Chairman stated. You are quibbling about words here. I think that is up to the Court to make the determination, and I think, as the Chairman has stated, his affidavit speaks for itself. I think again, you are arguing a legal matter with the Chairman, and for that reason I would object.

BY MR. SCHAUMBERG.

[112] Q Chairman Hartwig, did you prepare this affidavit?

THE WITNESS:

A Yes, sir. I signed it.

MR. SCHAUMBERG: I would like to identify the following documents as Exhibits to this deposition: Exhibit 5-a is the Report of Renegotiation.

(Whereupon, the subject Report of Renegotiation was indicated to be Plaintiff's Exhibit No. 5a for Identification, but was not marked and was left in place in File 4.)

MR. SCHAUMBERG: Exhibit 5b are the comments on Part 1a of the Report of Renegotiation.

(Whereupon, the subject Comments were indicated to be Plaintiff's Exhibit No. 5b for Identification, but were not marked and were left in File 5.)

MR. SCHAUMBERG: Exhibit 5c are supplementary comments on Part 1a of the Report of Renegotiation.

(Whereupon, the subject supplementary comments were indicated to be Plaintiff's Exhibit No. 5c for Identification, but were not marked and were left in place in File 5.)

MR. SCHAUMBERG: Exhibit 5d is the memorandum by the Office of Review—and please tell me, either Mr. Goldbloom or Chairman Hartwig, if this identification is not sufficient with regard to the testimony—

MR. GOLDBLOOM: I think there is sufficient information. As far as you are concerned, the characterization that he has [113] given relates to the specific document that you have been testifying about?

THE WITNESS: (No response)

MR. SCHAUMBERG: As supplemental identification of Exhibit 5d, it has the following captions: Business, Costs and Expenses, Government Assistance, Net Worth, Performance—I believe the next word was Data—and Statutory Factors, under which there was the subheading 1, the Region, Subheading 2, This Writer.

(Whereupon, the subject memorandum was indicated to be Plaintiff's Exhibit No. 5d for Identification, but was not marked and was left in place in File 5.)

MR. SCHAUMBERG: 5e is a memorandum of the reviewer to the Director of the Office of Review.

(Whereupon the subject memorandum was indicated to be Plaintiff's Exhibit No. 5e for identification, but was not marked and was left in place in File 5.)

MR. SCHAUMBERG: 5f is the memorandum setting forth the minutes of the meeting between the contractor and a Division of the Board.

(Whereupon, the subject minute was indicated to be Plaintiff's Exhibit No. 5f for Identification, but was not marked and was left in place in File 5.)

MR. SCHAUMBERG: 5g is the Report and Recommendation of the Division to the entire Board.

(Whereupon, the subject Report and [114] Recommendation was indicated to be Plaintiff's Exhibit No. 5g for Identification, but was not marked and was left in place in File 5.)

MR. SCHAUMBERG: 5h is the letter to the contractor advising him of the Board's determination.

(Whereupon, the subject Letter was indicated to be Plaintiff's Exhibit No. 5h for Identification, but was not marked and was left in place in File 5.)

MR. SCHAUMBERG: 5i is the contractor's request for a summary of factors and reasons.

(Whereupon, the subject Request was indicated to be Plaintiff's Exhibit 5i for Identification, but was not marked and was left in place in File 5.)

MR. SCHAUMBERG: 5j is the Summary of Facts and Reasons.

(Whereupon, the subject Summary of Facts and Reasons was indicated to be Plaintiff's Exhibit 5j for Identification, but was not marked and was left in place in File 5.)

MR. SCHAUMBERG: 5k is the Order Determining Excessive Profits.

(Whereupon, the subject Order Determining Excessive Profits was indicated to be Plaintiff's Exhibit 5 k for Identification, but was not marked and was left in place in File 5.)

MR. SCHAUMBERG: And 51 is the notice of order determining excessive profits.

(Whereupon, the subject Notice of Order Determining Excessive Profits [115] was indicated to be

Plaintiff's Exhibit No. 51 for Identification, but was not marked and was left in place in File 5.)

BY MR. SCHAUMBERG:

Q Chairman Hartwig, would you place before you the other file which resulted in a unilateral order determining excessive profits?

THE WITNESS:

A Let us take a recess.

(Whereupon, at 4:20 p.m., a recess was taken until 4:30)

MR. SCHAUMBERG: I noticed that during the recess that I had neglected to mark an exhibit, the Minute of the Board's Action, which I should now like to mark at Exhibit 5m.

(Whereupon, the subject minute was indicated to be Plaintiff's Exhibit 5m for Identification, but was not marked and was left in place in File 5.)

MR. SCHAUMBERG: Perhaps it would be easier to mark these exhibits since there are going to be a number of them as we go along. So we will do it in that fashion.

THE WITNESS: Do you want me to go through this file?

BY MR. SCHAUMBERG:

Q Would you please go through the file that you have before you in the same fashion.

THE WITNESS:

A Report of Renegotiation or—excuse me—I'm getting groggy. Can you strike that?

[116] I meant to say, the RBI contractor's filing.

Q If Mr. Goldbloom has no objection, I have no objection to your going through this one a little more rapidly than the previous one.

MR. GOLDBLOOM: Yes, you can go through it, you know, as you did before, and you needn't identify the substance of these documents. My comment, when I

originally made it, was designed to indicate that there were a lot more papers in these files than the various individual reveiwer's report and analysis, and the Part 2 or whatever.

And, as you indicated from going through the last file, there certainly are many more documents than that.

THE WITNESS:

A This is a Class A Case assigned to the Regional Board.

Memoranda of telephone coversations with the contractor.

Memorandum of a meeting with the contractor, request for information.

Regional Board granted contractor's request for concurrent consideration with another company.

Memorandum of telephone conversation.

Another such memorandum. Accountant's work papers. Memorandum of conversation with the contractor. Memorandum of meeting with representatives of the contractor.

A letter from the contractor commenting on the Part [117] 1a, accounting section.

BY MR. SCHAUMBERG:

Q Excuse me. Would you repeat that?

THE WITNESS:

A A letter from the contractor, commenting on the Part 1a, the accounting section of the Report of Renegotiation which had been previously transmitted to the contractor.

Q Had you come to that report of renegotiation in your file? Because I did not hear it mentioned?

A Not yet.

Q Does that mean it is out of order?

A Not necessarily. The accounting section could be prepared before the Part 2.

Q I see.

A This is a procurement agency report.

Memorandum of telephone conversation with procurement officials. Memorandum of several telephone conversations with various representatives of the contractor.

A letter enclosing copies of a memorandum prepared by the contractor as such for consideration at a Panel Meeting of the Regional Board.

Minutes of Panel Meeting.

Q Could you tell us what that is a minute of?

A Of the meeting.

Q In general terms.

[118] A Of the meeting with the contractor at which the contractor made various representations with respect to its performance and other matters.

MR. SCHAUMBERG: I should like to designate that document as Exhibit 6a.

(Whereupon, the subject document was indicated to be Plaintiff's Exhibit No. 6a for Identification, but was not marked and was left in place in File 6.)

THE WITNESS:

A Letter to the contractor from the Regional Board informing the contractor that it had made and entered a final determination that the contractor had made excessive profits. That letter asked the contractor to notify the Regional Board by a certain date whether it was willing to enter into an agreement.

MR. SCHAUMBERG: I should like to designate that document as Exhibit 6b.

(Whereupon, the subject letter was indicated to be Plaintiff's Exhibit 6b for Identification, but was not marked and was left in place in File 6.)

THE WITNESS:

A A letter from the contractor stating that it was not agreeable to enter into an agreement, and stating that it assumed that the case would now be reassigned to the Renegotiation Board in Washington.

[119] The minutes of the Renegotiation Board reciting that on a certain date it made a final recommendation that the contractor realized excessive profits in a certain

amount, noting that the contractor advised that it was willing to enter into an agreement, and recommending that the Regional Board declare an impasse.

BY MR. SCHAUMBERG:

Q Let that document be designated as Exhibit 6c.

(Whereupon, the subject minute was indicated to be Plaintiff's Exhibit 6c for Identification, but was not marked and was left in place in File 6.)

BY MR. SCHAUMBERG:

Q Chairman Hartwig, before you go on, does that document reflect the reason for the Regional Board's action?

THE WITNESS:

A It does not.

Q Is there any document in the file up to this point that designates the reason?

A The next document is the Panel recommendation to the Regional Board, commenting on the case.

MR. GOLDBLOOM: Did you say that was a panel of the Regional Board?

THE WITNESS: Yes.

And this document is the Panel report to the Board.

MR. SCHAUMBERG: I should like to designate that as [120] Exhibit 6d—

(Whereupon, the subject panel report was indicated to be Plaintiff's Exhibit 6d for Identification, but was not marked and was left in place in File 6.)

BY MR. SCHAUMBERG:

Q —and ask you whether that document states the reasons for the Regional Board's action. Did you say that was the Panel's report to the Statutory Board or the Regional Board?

THE WITNESS:

A The Regional Board.

MR. GOLDBLOOM: The Panel Report, as I understand it, to—

THE WITNESS:

A The title of this document is, "Panel Recommendations to the Regional Board."

BY MR. SCHAUMBERG:

Q And does that state the reasons for the recommendations?

MR. GOLDBLOOM: Objection. I think the question is objectionable for the same reasons that I have raised before mainly an attempt to characterize the document specifically as to what it contains or does not contain. I think the Chairman is entitled to characterize the document generally, but whether or not it contains reasons—specific, general, [121] or otherwise—I think is irrelevant.

BY MR. SCHAUMBERG:

Q Would you please give us the captions, if any, on that document, Chairman, as you have in the instance previously.

THE WITNESS:

A There are no captions.

Q Then, could you give us a general description of that document, other than its title? How many pages is it?

A Two pages.

Well, it's a report to the Regional Board commenting on the case, and recommending the refund that had previously been determined on a tentative basis.

Now, the next document—

Q Excuse me, just so there is no confusion here on the record, is it possible that these documents, or some of them, are out of their chronological order? Because—

A They are.

Q They are?

A Because now I come to the Report of Renegotiation, which preceded the Panel Meeting.

Q Is that part of the Report of Renegotiation?

A Part 1a and Part 2.

Q Would you give us the captions on Part 2 of the Report of Renegotiation, which I should like to designate as Exhibit 6e?

[122] (Whereupon, the subject document was indicated to be Plaintiff's Exhibit No. 6e for Identification, but was not marked, and was left in place in File No. 6.)

MR. GOLDBLOOM: If I may interject a request here, I realize that I will have an opportunity to cross-examine the witness, but it would be—it would probably make things a little easier if the Chairman could take a look at Part 1a now and determine whether it is in essence any different from Part 1a that he described previously, if you have no objection to that. Otherwise, I will reserve my question until the proper time.

MR. SCHAUMBERG: No, I was just trying to save the 15 minutes that were required previously to identify each heading in Part 1a.

THE WITNESS:

A Well, it is substantially like the Part 1a in the other case, and it is very voluminous, as was the Part 1a in the other case.

MR. GOLDBLOOM: How many pages?

THE WITNESS:

A About 33 pages.

MR. GOLDBLOOM: To Part 1a?

THE WITNESS:

A To the Part 1a.

Now, this report has a Part 1b, and all it says is that [123] the contractor submitted the statement as to performance, and statutory factors, which is in the case file, and incorporated herein by reference.

BY MR. SCHAUMBERG:

Q Thank you. Will you identify the captions on Part 2?

THE WITNESS:

A Application of statutory factors. Under that, Character of Business, Reasonableness of Costs and Profits. Extent of Risk Assumed. Contribution to the Defense Effort, Capital Employed. Efficiency. And then there is a special section which sets forth in great detail a summary of certain performance data.

Next heading is Determination, and under that is Proposed Recommendation.

The next—and this is out of order—is a minute stating that the Board approved a tentative recommendation that the contractor realized excessive profits.

Q Is that the Regional Board?

A The Regional Board. These are Regional Board minutes.

MR. SCHAUMBERG: I'd like to designate that as Exhibit 6f.

(Whereupon, the subject minute was indicated to be Plaintiff's Exhibit 6f for Identification, but was not marked and was left in place in File No. 6.)

[124] BY MR. SCHAUMBERG:

Q Does that minute give reasons for the action?

THE WITNESS:

A It does not.

The next minute states that the Board approved the recommendation of the Panel, and made and entered a final recommendation that the contractor realized excessive profits, and in certain amounts.

MR. SCHAUMBERG: I'd like to designate that as Exhibit 6g.

(Whereupon, the subject minute was indicated to be Plaintiff's Exhibit 6g for Identification, but was not marked, and was left in place in File No. 6.)

THE WITNESS:

A The next minute records the fact that by letter of a certain date the contractor advised that it was not

willing to enter into an agreement for the elimination of excessive profits. An impasse was therefore declared to exist;

MR. SCHAUMBERG: Made that Exhibit 6h.

(Whereupon, the subject minute was indicated to be Plaintiff's Exhibit 6h for Identification, but was not marked, and was left in place in File No. 6.)

MR. GOLDBLOOM: Is that also a Regional Board minute?

THE WITNESS:

A We are still at the Regional Board level.

[125] MR. GOLDBLOOM: Those three minutes then, are—

THE WITNESS:

A —all Regional Board minutes.

Next is a letter to the contractor, notifying the contractor that the Regional Board had made a final recommendation that the contractor realized excessive profits in a certain amount, reciting the fact that the contractor had advised that it was not willing to enter into an agreement, and notifying the contractor, therefore, that in impasse existed and that the Renegotiation Board would reassign the case to itself.

MR. SCHAUMBERG: Let that be designated as Exhibit 6i.

(Whereupon, the subject letter was indicated to be Plaintiff's Exhibit No. 6i for Identification, but was not marked, and was left in place in File No. 6.)

MR. GOLDBLOOM: I'm sorry. What was that?

MR. SCHAUMBERG: It was a letter to the contractor.

MR. GOLDBLOOM: From the Regional Board?

MR. SCHAUMBERG: (Nods head affirmatively.)

MR. GOLDBLOOM: Saying that there is an impasse?

THE WITNESS:

A (Nods head affirmatively.)

MR. GOLDBLOOM: (Nods head affirmatively.)

THE WITNESS:

A This is a letter from the Secretary of the Board [126] to the contractor, stating that the case had been reasigned from the Regional Board to the Renegotiation Board, and that the contractor would be requested in due course to attend a meeting with a Division of the Board in Washington, D.C.

Next is a memorandum of the Office of Accounting addressed to the Office of Review, commenting on Part 1a.

MR. SCHAUMBERG: Let that be marked as Exhibit 6j.

(Whereupon, the subject memorandum was indicated to be Plaintiff's Exhibit No. 6j for Identification. However, it was not marked and was left in place in File No. 6.)

THE WITNESS:

A This is followed by the Review of Determination, Office of Review.

MR. SCHAUMBERG: Let that be Exhibit 6k.

(Whereupon, the subject Review of Determination was indicated to be Plaintiff's Exhibit No. 6k for Identification, but was not marked and was left in place in File 6.)

THE WITNESS:

A Next is a report entitled "Analysis and Recommendation" prepared by a reviewer and addressed to the Accounting Director, Office of Review.

MR. SCHAUMBERG: I should like to have that marked as Exhibit 6l—

(Whereupon, the subject report was indicated to be Plaintiff's Exhibit No. 6l for Identification, but was not marked and was left in Place in File 6.)

[127] BY MR. SCHAUMBERG:

Q —and could you tell us if that document has captions on it?

THE WITNESS:

A First, if I called it a report, it is called a memorandum. It does have captions.

Q Could you tell us what they are?

A Business, Costs and Expenses, Subcontracting, Research and Development, Officers' Compensation, Interest Paid, Contributions, Government Assistance, Net Worth, Performance Information, Statutory Factors.

Under that, The Region. Character of Business, Extent of Risk Assumed, Contribution to the Defense Effort, Capital Employed, Reasonableness of Costs and Profits.

Next is, The Contractor, under Statutory Factors. And a summary of contractor's representations with respect to Character of Business, Contribution, Extent of Risk Assumed, Capital Employed, Reasonableness of Costs and Profits, Efficiency, and then another heading, "This Writer," setting forth his views.

Capital Employed, Efficiency, and then Reasonableness of Costs and Profits, Conclusion and Recommendation.

This is a document entitled, "Record of Meetings." This refers to the meetings between the procurement agency and the contractor.

[128] Next, the minutes of meetings held by the Division with the contractor.

Next is a memorandum from a Board member addressed to the Board.

Q Could you tell us what the import of that document is?

MR. GOLDBLOOM: I would object to a characterization of the document in anything other than the most general terms.

THE WITNESS:

A It dissents from the Division's recommended termination.

MR. SCHAUMBERG: I'd like to mark that as Exhibit 6m.

(Whereupon, the subject memorandum was indicated to be Plaintiff's Exhibit 6m for Identification, but was not marked and was left in place in File No. 6.)

MR. SCHAUMBERG: Excuse me, may I have the Chairman's last answer read back?

(The record was read by the reporter.)

MR. SCHAUMBERG: Thank you.

THE WITNESS:

A Next is a memorandum from the Board, which is the report and recommendation of the majority of the Division.

MR. SCHAUMBERG: I'd like to have that marked as Exhibit 6n.

[129] (Whereupon, the subject memorandum was indicated to be Plaintiff's Exhibit 6n for Identification, but was not marked and was left in place in File No. 6.)

BY MR. SCHAUMBERG:

Q Does that document have captions?

THE WITNESS:

A Well, it does; but I think that if I gave you some of the questions that it would identify the contractor.

MR. SCHAUMBERG: Lets go off the record, please.

(Whereupon, a short discussion was held off the record.)

MR. SCHAMBURG: Let us go on the record.

THE WITNESS: All right.

BY MR. SCHAUMBERG:

Q Chairman Hartwig, does that document have some questions which refer to the statutory factors?

THE WITNESS:

A Yes, it does.

Q Does it refer to all of them?

A One, two, three, four, five, six. It does refer to all of them.

Q Would it be appropriate for you to read the captions which would not identify the contractor involved?

A Well, there is one caption, "Adjustment". I don't think that identify the contractor.

Q Not to me.

[130] A There are requests for records and documents. A request for records and documents under the Freedom of Information Act.

Q Excuse me, Chairman, please. My previous question was whether you would be willing to read the captions on the report and recommendation of the Division which you felt would not disclose the name of the contractor, is that what you are doing now?

A Yes. One caption was "Adjustments" and the other is "Request for records and documents."

Q I see. Thank you.

A And that's it.

MR. GOLDBLOOM: Are there any—let us go off the record.

(Whereupon, a short discussion was held off the record.)

MR. GOLDBLOOM: Let us go back on the record.

THE WITNESS:

A The six statutory factors are captioned here.

BY MR. SCHAUMBERG:

Q Is there then a conclusion?

THE WITNESS:

A And there is a conclusion.

Q Thank you.

A Next is a letter to the contractor informing him that the Board had determined excessive profits in a certain [131] amount, and requesting the contractor to inform the Board no later than a certain date whether it wished to enter in to a bilateral agreement, or whether the Board should proceed to issue a unilateral order.

MR. SCHAUMBERG: I'd like to mark that as Exhibit 6o.

(Whereupon, the subject letter was indicated to be Plaintiff's Exhibit 6o for Identification, but was not marked and was left in place in File No. 6.)

THE WITNESS:

A Apparently the contractor advised the Board that it did not wish to enter into a bilateral agreement.

Next is the order determining excessive profits, and Notice of Order determining excessive profits.

MR. SCHAUMBERG: I'd like to mark those respectively as Exhibits 6p and 6q.

(Whereupon, the subject order and Notice of Order were indicated to be Plaintiff's Exhibits Nos. 6p and 6q, for Identification, but were not marked, and were left in place in File No. 6.)

THE WITNESS:

A The file also contains performance reports.

BY MR. SCHAUMBERG:

Q Is that the entire file?

THE WITNESS:

A That is the entire file with the exception again of the Assignment File, which is a separate file.

[132] Q And I trust, also the Board minutes?

A And the Board minutes.

Q Do you have those available to you?

A The minute recites that the Division Chairman presented the Division's report and recommendation on behalf of himself and the Division, in connection with the review of the proposed determination by the Regional Board that the contractor had realized excessive profits. The third member of the Division presented a memorandum presenting his view. In the absence of one of the Division Members, the Chairman stated that he had mailed the Division report and ate dissenting memorandum to the absent colleague, and that the latter advised him by telephone that the Division report represented his views.

The minute states that the Board approved the Division recommendation, and determined that the contractor realized excessive profits.

One Board member dissented.

The mintue also recites that a copy of the Schedule A which had been revised by the Office of Accounting, would be furnished to the contractor.

MR. SCHAUMBERG: I should like to have that minute marked as Exhibit 6r.

(Whereupon, the subject minute was Indicated to be Plaintiff's Exhibit 6r fo: Identification, but was not marked and was left in place in File 6.)

[133] BY MR. SCHAUMBERG:

Q Chairman Hartwig, in this case was there prepared a Summary of Facts, and Reasons by either the Regional Board or the Statutory Board?

THE WITNESS:

A Not to my knowledge.

Q Was there prepared a Statement of Facts and Reasons by the Statutory Board or by the Regional Board?

A Not to my knowledge.

Q In your opinion, did the Board have any reasons for this final action it took?

A Each Board member had his own reasons.

Q Are those reduced to writing at any place?

A Not in any Board-approved document. This minute clearly recites that the recommendation of the Division was approved by the Board. It does not recite approval of the Division report.

Q In as much as the two unilateral orders which have been furnished are in the amount of $8 million and $9 million respectively of excessive profits, is it your statement, sir, that whichever one of those unilateral orders is the subject of the case about which you just testified, that the Board did not as a body have any reasons for entering an order in that magnitude?

MR. GOLDBLOOM: I object to the question. I think the [134] Chairman has explicitly stated the nature of the

proceedings contained in each file, and the manner in which memoranda were prepared. The question that you asked is argumentative and irrelevant.

MR. SCHAUMBERG: Irrelevant?

MR. GOLDBLOOM: Right. And if at all relevant, legal in its nature. The Chairman has twice specifically stated precisely the nature of the documents involved.

MR. SCHAUMBERG: I am asking the Chairman a question with regard to his personal knowledge, which does not require any legal opinion whatsoever on his part. I am asking him whether, as a member of the Board at the time this unilateral order was entered, whether the Board as a body had any reason for the order which it entered.

THE WITNESS:

A Well, each Board member who voted for the refund determination had his reasons, but those reasons were not necessarily shared by any one or all of his colleagues.

In the nature of this process, at the Board level, there is considerable discussion of these cases, which is oral in nature. It's not recorded in the minutes; it's not recorded in any document until the Board issues a summary or a statement upon the request of the contractor.

BY MR. SCHAUMBERG:

Q If the contractor were to request a statement, [135] Chairman Hartwig, would it be necessary to reconvene the Board in order to draft that statement?

THE WITNESS:

A No. The—in practice the staff, particularly the staff of the Office of Review, assists the Board in the preparation of a summary. This draft of summary is submitted to the Board members who then furnish their comments, and a final draft, incorporating these comments, and sometimes not incorporating those comments, is then prepared and sent to the contractor.

Q If you were subpoenaed by a Federal Court at this point to give your reasons for that unilateral order, would you be able to do so?

MR. GOLDBLOOM: Objection. Objection. That's a legal question. It's an effort to probe the mind and mental processes of the witness, making a judgment, determination authorized by statute. The question is improper in its entire nature.

MR. SCHAUMBERG: I just have a few more questions.

MR. SCHAUMBERG: To your knowledge, Chairman Hartwig, have there been any instances where the Board has been requested to issue both a summary of facts and reasons, and a statement of facts and reasons?

THE WITNESS:

A There have been such instances.

[136] Q Could you estimate how many there have been?

A Over a period of 19 years, this would be very difficult to estimate.

Q Can you think of any recent examples of that?

A Right now I can't.

Q Is there a particular form that is used by the Board in issuing its statements, facts and reasons, and outline-type form?

A Well, the form differs from the form of the summary, I believe.

Q Can you tell me what form that statement generally takes?

MR. GOLDBLOOM: Do you understand the question?

THE WITNESS:

A What is the question, again?

BY MR. SCHAUMBERG:

Q Well, let me rephrase it: The Board has published certain form letters in the Code of Federal Regulations. Are there similar forms not published, or published somewhere that I haven't seen it, which indicates the manner in which, or the methodology, really, of issuing a statement of facts and reasons?

THE WITNESS:

A I don't think that the regulations set forth such forms. There is no—there is no form as such.

[137] Q From your experience, could you tell us what the form of a preponderance of the statements contain?

A As distinguished from summary?

Q No, sir. Not as distinguished from summary, unless there is a distinction which ought to be made.

A I think that the summary which I've described for the record in one of these cases, is a pretty good example of the form of summary issued by the Board.

Q That was the summary in File 5, the one that we discussed immediately prior to this one?

A I think so.

Q I believe that document was identified as Exhibit 5j, of which Roman Numeral 1 was entitled "Determination, II, Introduction, III, Statutory Factors", with each one of the factors listed there under. And then a conclusion.

A I believe that in some cases the summary would discuss special matters. For example, the question of an exemption might be involved in a case, a legal question. And the summary would set forth the Court's views with respect to the granting or denial of the particular exemption.

Also, there might be some significant accounting issues which would be set out in a separate section, where the Board would discuss its position with regard to the particular accounting issue.

Q Now, while you've stated that Exhibit 5j is typical [138] of a summary, would you say that this document is also typical of the headings in a statement of fact and reasons?

A Substantially the same, yes.

Q Are there any distinctions that you failed to mention?

A Well, of course it bears a different action. It is a statement rather than a summary.

Q Is there anything else?

A That's approximately all I can think of at this point.

Q You stated earlier in your testimony that it is the desire of the Board to enter into agreement with a contractor when there has been a determination of excessive profits. Must that agreement in every instance be in the amount of the Board's or the Regional Board's determination?

A Well, you must view the process from the very beginning, and perhaps—perhaps we haven't discussed sufficiently the case where the Regional Board proposes a tentative determination. In fact, all refund cases originating in the Regional Board, start with tentative determination, and this is the first time in the proceedings that this figure has been approved tentatively—when the contractor at a renegotiation conference is informed orally of the reasons for the tentative determination and is given an opportunity to bring forth any additional information, any additional argument, if he feels that [139] this is required in the case.

So, this is the first opportunity he has to agree or not agree with it tentatively.

Our regulations, then, give him an opportunity, if he wishes, to proceed further, to ask for a Panel meeting of the Regional Board, at which time the Board will review the matter—the Panel will review the matter afresh. If in these negotiations, the contractor can persuade the Panel that the tentative determination is wrong, that figure can be adjusted. That's the first step. And I may add, I may add that it does happen. I don't have the statistics, but it does happen, after a Panel meeting, that the Regional Board will adjust the tentative determination and give the contractor another opportunity to agree.

And if at that point in the negotiations, if it's in a Class A Case, for example, he can come to the statutory Board where, once again, this Board in reviewing the case takes another fresh look at it to see whether in these negotiations, another figure could be a reasonable figure under the fair application of the law.

So this, in my judgment, in a nutshell, shows the constant effort here in our procedure to come up with a fair proposal that the contractor might agree to. And I may

add, the statistics show that the Board's been highly successful in that regard.

[140] BY MR. SCHAUMBERG:

Q One final matter, Chairman Hartwig. It is my understanding that the Board is, pursuant to the mandate from the Court of Appeals, now making available its statements of facts and reasons, with the deletion of identifying detail.

It has also come to my attention that this is being done in a chronological manner. In other words, each time a new statement is rendered by the Board, the appropriate deletions are made, and the statement is then made available to the public in chronological order.

In as much as it is your earnest desire, as you have just stated, to reach agreement with contractors, and inasmuch as Part 1460 of the Board's regulations make it quite clear I think, that a contractor is compared by the Board and is also expected to compare himself against others using the same or similar products or using the same or similar processes, how can a contractor glean any of the principles or standards that are expected to gleaned from these opinions, when they are not separated, at least in this minimal manner, by products, and by processes, but are merely published in a chronological manner? How is that possible?

MR. GOLDBLOOM: The question is argumentative, and irrelevant. The Board—

MR. SCHAUMBERG: Mr. Goldbloom, a moment ago you objected to another question, stating that we must stay within the [141] mandate of the Court of Appeals, and I think I am doing exactly that when I ask the manner in which the Board is complying with the order of the Court of Appeals.

And while you may characterize the question as argumentative, I think the Chairman is quite sincere when he says that he would like to see contractors, even more than they are now, enter into agreement with the Board. And as a representative of the public, I think I can state that the Board's manner of publication is not helping contractors. And I just want to know whether, in the Chair-

man's view, there might not be an additional conveyance of information to the public by having these Board statements of facts and reasons published in what I would characterize as a meaningful manner, not merely a chronological manner.

MR. GOLDBLOOM: I think you have a very interesting concept, Counsel. I still think your question is argumentative and irrelevant. The Board has, pursuant to the direction of the Court of Appeals, made available to the public its statements of facts and reasons with appropriate deletions as authorized by the Court of Appeals. If you have a quibble with the segregation of these statements of facts and reasons or the manner in which they are made public, outside of the way they are being done today, I suggest you take that question to the appropriate tribunal, whether it be—

MR. SCHAUMBERG: I have no quibble. I think the Chairman [142] is very well prepared, and certainly capable, of answering the questions I have asked. And I don't see that you are benefitting anyone, Mr. Goldbloom, by trying to muzzle him on this question.

MR. GOLDBLOOM: I resent that, the suggestion that I am trying to muzzle the Chairman. You have stated and made a request that is argumentative in nature, and you are asking the Chairman how he might better do something which he has not been required to do, and that is outside the scope of this examination. If you want to question the manner in which the statements have been made available, then you take it to the appropriate agency. The facts are quite clear.

MR. SCHAUMBERG: I am asking the question of the appropriate person at the appropriate time, since we have before us, or before the District Court, a motion that the Board act in accordance with the mandate of the Court of Appeals, and I have before me as the witness at this deposition, the Chairman of the Board, who is empowered to determine how the Board will implement the Freedom of Information Act, and how it will act to comply with the mandate of the Court of Appeals. And I am asking the Chairman whether he has considered any other form of publication other than the one

presently being used, and I will stop the question right there.

MR. GOLDBLOOM: I object to the question on the ground that it is argumentative and that it is an effort to probe [143] the mental processes of the witness, which is improper. The fact is that what has been done is a clear matter of record. If you are dissatisfied with that, then you should seek an appropriate remedy. Otherwise, this witness is not—it is not necessary that this witness answer that question.

MR. SCHAUMBERG: I suggest to you, Mr. Goldbloom, that you should allow the witness to answer the question, if he would like to answer it.

MR. GOLDBLOOM: I have stated my objection, and I have directed the witness not to answer.

BY MR. SCHAUMBERG:

Q Chairman Hartwig, can you tell me anything about the manner in which your minutes are presently made available to the public?

THE WITNESS:

A Well, as you stated, the Statements of Facts and Reasons are placed in the Public Information Library of the Board, and we have endeavored in good faith to comply with the mandate of the Court of Appeals with respect to the matter of deletions.

Q Do you foresee a time, sir, where you will have rendered hundreds of opinions which will all of had the identifying details deleted so that they will be simply a conglomeration of documents from which no meaning can be gleaned?

[144] MR. GOLDBLOOM: Objection. The question is argumentative. The Chairman has already stated what the Board does and has done pursuant to the order of the Court of Appeals. If you have some quibble with that I suggest that you take it to an appropriate agency.

MR. SCHAUMBERG: I have no further questions, gentlemen.

MR. GOLDBLOOM: I would like about a five-minute recess.

(Whereupon, a short recess was taken from 5:35 until 5:45)

CROSS-EXAMINATION

BY MR. GOLDBLOOM:

Q Mr. Chairman, on Friday, your deposition commenced, and over the weekend both the plaintiff and the defendant obtained a prompt transcript of the testimony that was taken on Friday, and I furnished you with a copy of that this morning, did I not?

THE WITNESS:

A Yes, you did.

Q I believe you advised me that there were some minor corrections that you wanted to make in a statement that appears on page 36, and if so, would you like to explain?

A Yes. You will recall that I testified that typically, in the Class A Clearance Cases that we were discusses, each Board member receives a copy of the review of determination, a copy of the reviewer's recommendation, if there was one, [145] a copy of the memorandum of the Office of Accounting addressed to the Office of Review, and a copy of the Report of Renegotiation.

The question was asked whether these documents were retained by the Board members and I checked since my testimony and wish to correct the statement that I made on Page 36.

Each Board member, after the case has been decided, returns those copies to the central files. He does not retain them in his own files.

Likewise, in a case involving a refund, where similar documents including an analysis from the Office of Review are supplied to the Board members, these documents are returned to the central files after the case is closed.

Q Mr. Chairman, how many members are there of the Renegotiation Board?

A There are five.

Q It is my understanding that the members of the Renegotiation Board are appointed to that position by the President, subject to confirmation by the Senate, is that correct?

A That's correct.

Q Is the same true with respect to Regional Board members?

A Regional Board members are Civil Service employees.

Q What is the basis for the creation of the Regional Board?

[146] A The Regional Boards are created in order to assist the Statutory Board in processing the large volume of cases which we receive. It permits us to decentralize the operation, particularly in the Class B area.

Q Who appoints the Regional Board members?

A The Statutory Board.

Q And you say they are Civil Service employees?

A Yes.

Q Throughout your direct examination you have been questioned concerning various reports of renegotiation that are contained in these files. Can you tell us why a report of renegotiation is prepared?

A A report of renegotiation is prepared in order to assist the Board in its efforts to reach agreement with the contractor, whether excessive profits are found.

Q I believe when you were testifying concerning files 5 and 6 you described in some detail Parts 1a and Part 2 of the Report of Renegotiation. Who prepares Part 1a?

A The accountant.

Q Who prepares Part 2?

A The renegotiator.

Q Is this typical of the way in which the report of renegotiation is prepared?

A This is typical, if you understand that in some cases a Regional Board member as such acts as a renegotiator.

[147] Q I believe that in the File 5 and 6 you examined the documents which constituted the Report of Re-

negotiation, and that they were rather lengthy documents with schedules. Can you give us an estimate of the size of the documents, roughly?

A The number of pages?

Q The number of pages.

A I think in the two cases we examined, the report of renegotiation could approximate as much as 50 pages, 40 or 50.

Q I see. That would include Part 1a and—

A 1a and Part 2.

MR. SCHAUMBERG: For purposes of clarifying the record, could you give a breakdown of your estimate of the number of pages.

BY MR. GOLDBLOOM:

Q I am talking about in general terms.

THE WITNESS:

A The documents are here. We can count the pages, if that's important.

Q Well, we can come back to a count in a minute.

MR. SCHAUMBERG: Mr. Goldbloom asked the question, so I thought the record should reflect an accurate count since he asked it.

THE WITNESS:

[148] A Well, may I say that in those refund cases, the report of renegotiation would tend to be more extensive than in the clearance case. And in fact, as I testified, in some clearance cases we have a short form.

The report of renegotiation in Exhibit 5 had 45 pages.

BY MR. GOLDBLOOM:

Q In its entirety?

THE WITNESS:

A In its entirety.

Q Can you break that down between parts 1a—

A 38 pages, Part 1a. And the balance, Part 2.

Q I believe you stated that Part 1a is furnished to the contractor.

A It is, upon their request.

Q Upon the contractor's request. Is Part 2 furnished to the contractor?

A It is not.

Q Do you have some figures on Exhibit 6 for report of renegotiation?

A Yes. The Part 1a comprised 43 pages, and Part 2, 11 pages, for a total of 45 pages.

Q At various points in your testimony, in your direct testimony, you made a point of stating that the various internal memoranda which you were describing, such as the report of renegotiation, the reviewer's report, the Panel [149] Division Report, etcetera, passed along a recommendation to the Board. And at various points you indicated that the Board either approved or disapproved the recommendation, but did not adopt the report. Can you explain why that is so?

A As a practical matter, as I think I said earlier, the Board would never get the job done as expeditiously as Congress intended for it to be done, if a Board agreement had to be secured with respect to every report which is submitted to it. Another reason that the Board operates this way is that this is a judgemental type of operation where Board members may disagree with each other respecting the evaluation of a particular statutory factor; but, nevertheless, can agree on the decision. Frequently it happens in Board discussions that one Board member will emphasize one factor more than another. Or, I know of instances where, upon review of a proposed clearance, an individual Board member might criticize the report of renegotiation because it omitted something. He may even question whether the recommendation incorporated in that report is sufficiently supported in the report itself.

But when he makes an independent examination of the file he may find, for example, a performance report which convinces him that the recommended clearance is appropriate, even though the particular renegotiator may not have commented favorably on the contractor's performance. [150] This will simply illustrate how these cases come before the Board.

There may be a case where one Board member will consider that the clearances are justified, clearance is justified, in his own mind, because the overall costs are reasonable. Another Board member might not be impressed by that point, he may consider that perhaps the overall costs are not low costs, but simply reasonable costs, but be more impressed by the contribution to the defense effort than his colleague. Nevertheless, despite the differences in evaluation, they can agree on the result.

Q Is risk another area of subjective judgment?

A Risk as such is another area where it is very easy for people to disagree in the evaluation that they accord risk in a particular case.

Complexity of business, complexity of the product or the manufacturing process is another factor which calls for a considerable amount of judgment, where people can differ in the emphasis they place on the question of complexity.

Q Now, in a hypothetical case, let's say, where a contractor has been renegotiated and there is pending before the Board at a Board meeting the recommendation for a refund in a specific amount, will there characteristically be a discussion by the Board members of the various factors?

A There will be a discussion.

[151] Q Will this discussion be limited to the concepts or statements that are contained in the report of renegotiation?

A They will not be limited to those concepts.

Q Will they be limited to the concepts or analysis that may appear in a Division panel report to the Board?

A They will be not limited to those concepts.

Q Will they be limited to the concepts of the report of the Office of Review?

A They will not be so limited. As I pointed out, the case file is available to each Board member and quite often the Board member may independently review that file to decide for himself what evaluation to give that case. I know there are instances where I've seen these reports, and on the surface have felt that I should do some independent investigating, in which case I would either

call for the case file or have someone investigate a certain point in the case file for my benefit.

Q In that circumstance, you would be satisfied that the report of renegotiation does not fully explicate your views on the subject that are dealt with?

A That's right. Some reports, some analyses are very ellyptical, and you can see this from the record, and it is possible in this judgement area that you disagree with the manner in which someone has discussed or treated a certain factor.

[152] Q That's in your direct examination toward the close, you were discussing and describing a document in, I believe, File 6, and you pointed out that there is headings contained in that analysis and recommendation by a member of the Office of Review, set forth under the Statutory Factors, divided between the region, the contractor and "This Writer." Does that suggest, without looking at the file, does that suggest that there were differences in the analysis?

A Oh, yes. There could be differences between the reviewer and the renegotiator. And as I pointed out, the Director of the Office of Review sometimes disagrees with the reviewer's evaluation.

Q I notic that in various of these files, the Board considers not only the analysis prepared by the reviewer, but also requires a recommendation from the head of the Office of Review. Is that correct?

A That's correct.

Q So that the Board does not require the reviewer's analysis to be subsumed in the analysis of the Office of Review?

A Well, it does not express the official view of the Office of Review, in some cases.

Q Is the Board trying to get one analysis?

A The Board is trying to get the benefit of the views of the Director as well as of the reviewer.

[153] Q You spoke a moment ago about the Board's statutory obligation and the amount of business that it has. Do you have any figures which would show the number of cases handled by the Board, either on an annual basis or, say, from its inception?

A Yes. I have figures which will appear in the Board's 1970 Annual Report, which speaks as of June 30, 1970. And that report discloses that since the inception of the Renegotiation Act, the Board has made 4,006 determinations of excessive profits, in a gross amount exceeding $1 billion. Of that number, 3,524, or 80% of the total, culminated in agreements with contractors.

And this statistic, in my opinion, shows that the Board is carrying out the Congressional mandate that excessive profits shall be eliminated by agreement in an expeditious manner.

Q Now, Mr.—

A This is why our procedure is informal. We are trying to reach agreements. The entire procedure is directed toward that objective.

Let me complete the figures: There were 482 orders during the same period, of which 203 were appealed to the Court, which is a very small percentage of the total of 4006 determinations, which shows I think, that the procedure works.

Q Does—

[154] Now, last year the Board screened 4853 filings, and issued Clearances without Assignment in 4163 cases: 690 were assigned to Regional Boards. This will give you some idea of the volume of work that the Board has.

Q So that the figure that 4006 evaluations of excessive profit since its inception does not include the yearly determinations which result in clearance of the contractor?

A It does not.

Q Can you explain briefly what is a clearance, what does it mean?

A Well, you start with the provision of the statutes. Congress has said that the Board shall endeavor to make an agreement with the contractor with respect to the elimination of excessive profits. And it is only in those cases where we have failed to make such an agreement, at the end of the road, as it were, that we issue a unilater order. So the entire thrust of the statute is the elimination of excessive profits.

If the Act is read, you won't find the word "clearance" mentioned at all. The Act simply says that if the Board does not make an agreement or an order determining the amount of excessive profits within a case, within the prescribed limits of time, the contractor's liability under the Act is discharged. Technically, then, I suppose the Board could in effect grant a clearance simply by not making a determination of excessive profits. And so, the —but that would not be [155] good administration, and therefore we issue clearance notices to inform the contractor that we have "signed off" in our efforts to eliminate excessive profits where they are found to exist. It is our policy and our practice as soon as we have enough information to convince us that there are no excessive profits.

Q Does a clearance have any precedential value for a contractor, say, in a following year when it files its report with the Renegotiation Board?

A Well, there are—there is a section of the regulations which should be mentioned, and that's 1460 dash, or 1460.2(D) which states that renegotiation settlements for prior years are not controlling precedents.

And in effect it says that determinations of excessive profits will be predicated on the facts and circumstances of the year under review. So if a contractor receives clearance in one year because, let us say, he was very efficient or had great risk, it doesn't necessarily follow that the same result would be obtained in the next year, because each year must stand on its own feet. And the facts of each year are different.

Q Suppose there are questions of accounting allocations. Is that controlled by a clearance notice?

A Well, the clearance notice itself in the form that is set out in the regulations, 1498.6—and the two paragraphs [156] which I will read into the record, are the same whether the clearance is without assignment or after assignment. Those paragraphs read as follows:

"This instrument shall constitute the final action by the Government with respect to renegotiation, pursuant to the Act for the fiscal year under review. That the Government shall have the right to withdraw this notice if it should later appear that the data upon which the

determination set forth in Paragraph 1 hereof has been made, does not reflect correctly the renegotiable business of the contractor for the fiscal year under review, or contains any incorrect statement of a material fact. In the event of such withdrawal, renegotiation will be conducted with the contractor as if this instrument had never been issued."

And then this paragraph: "This notice does not necessarily constitute an approval or disapproval of all the methods used by the contractor in determining renegotiable sales and profits or losses for the purpose of any subsequent fiscal year."

Now, you may ask you does the Board have the right to withdraw a clearance notice? We come back to the paragraphs in the Act which govern this activity.

The first period which is significant is the one-year period for commencement of renegotiation, which is a technical term in the statutes. The Board must commence renegotiation [157] prior to the expiration of one year following the date upon which the contractor has made his filing. If the Board does not commence within a year, all liability of the contractor under the Act is discharged.

As a normal practice we do not commence renegotiation at headquarters. And so, with respect to the many thousands of cases where we issue clearances without assignment, these notices go out before the expiration of the expiration of the, the Board has the right to withdraw the clearance. With respect to cases assigned to the Regional Boards, where renegotiation is commenced, there is another provision of the statute, which states that if an agreement or order determining excessive profits is not made within two years following commencement, then upon the expiration of such two years all liabilities of the contractor for this excessive profit are discharged.

In cases where there is a clearance after assignment, that clearance notice is usually issued before the expiration of the period for completion. And so, that notice, like the notice of clearance without assignment, can be withdrawn until the two years has elapsed.

Q Why does the Board make a disclaimer as to the specific methods of accounting that a contractor may use when it issues a clearance notice?

A Well, in the first place, sometimes the accounting [158] data which is supplied may be in error, and it may be discovered although more important than that, I think, is the pragmatic point that we are in the business of eliminating excessive profits. And therefore, if in a particular case a contractor may contend that a certain item of cost is allowable against renegotiable business, and in his filing takes that allowance, but the amount is so small that it would not affect the overall picture, the Board will not spend time arguing with the contractor about the validity of this allocation, since it would not make any difference in the end result anyway, reserving the right, then, in a future year where it does make a difference, to pursue the matter with the contractor.

Q Now, in a given case, this problem or this aspect of the methods of allocation, is it correct to say that they may be accepted, say, by the Office of Accounting of the Board in Part 1 of the Report of Renegotiation, or by the accountant, rather, in his preparation of Part 1a of the Report of Renegotiation?

A Yes, it is possible that the accountant will permit the cost to stand as a renegotiable cost, but noting the amount and directing the Board's attention to the fact that perhaps the cost should be disallowed. Since, however, the amount is so small, it is not worth the argument in a particular year, and it's a pragmatic way of disposing of these cases without pursuing matters which wouldn't make any difference [159] anyway.

Now, the same is true sometimes with respect to exemptions taken. The contractor may make his filing and let us say, has claimed a commercial article exemption in a small sum, let us say, $5000 in a $10 million picture. We may have serious questions about the propriety of that exemption and so we carefully note, when he gets his clearance, that we have not decided for precedential purposes that the exemption is appropriate.

Q I see. In describing the Board's issuance of unilateral orders, I think you indicated that there were

482 unilateral orders issued by the Board, up to the end of this past fiscal year.

A Right.

Q As Counsel had directed to describe the files, I believe you talked about only two separate files which involved the issuance of unilateral orders.

In one file, the summary of facts and reasons was issued by the Board, and in the other file, no such document nor a statement of facts and reasons was issued. Can you tell us from your experience in the 482 unlilateral order cases issued by the Board over the years, what is generally the practice of contractors concerning requesting a summary of facts and reasons [160] in connection with the issuance of the unilateral order? And of course I recognize that the summary is issued prior to the issuance of the unilateral order.

A At the present time the vast majority of contractors request summaries. And I don't know the statistics on statements.

Now, let me say another thing about summaries: I don't know that the record has brought this out: the contractor at the regional level is entitled to a summary of facts and reasons where the Regional Board is proposing a refund. Again, this is an administrative document, which is designed to win agreement. And so, we find these days that more often than not—I don't know what the statistics are—but it could well be in 85% of the refund cases—the contractor requests from the Regional Board and receives a summary of facts and reasons, before the Regional Board makes its final recommendation.

So, that's one summary.

In an impasse case, when the case comes up to the Statutory Board, if the Statutory Board finds, determines, that there is excessive profits, before it so issues a unilateral order again, our procedure gives the contractor the right to request another summary, a summary from the Statutory Board, to enable him to decide whether to agree or not.

So that in many cases these days a contractor who at the [161] end of the road has received a unilateral order has had two summaries, in addition to the oral explana-

tion that I described, made by the renegotiator in the first instance of the renegotiation conference.

Q It is possible that in such a case where two summaries have been issued, that the contractor may request a statement of facts and reasons after the issuance of the unilateral order?

A It is possible.

Q I would like to go, briefly, into the preparations of the summaries and statements. The contractor requests the summary or statement, and I believe you testified that the manner of preparation between the two was not dissimilar. Can you briefly describe how the summaries or statements are prepared?

MR. SCHAUMBERG: May I just interrupt? In light of the lateness of the hour, I'd like to make a telephone call. So that I don't get into trouble at home.

(Whereupon, a very short recess was taken.)

THE WITNESS: Will you please read the last question?

(The record was read by the reporter.)

THE WITNESS:

A The summaries are prepared here at headquarters by the staff. If, of course, there are accounting questions, the Accounting shop will participate in the drafting of the [162] section on accounting. If there is a particular matter involving an exemption and a legal issue, the General Counsel will have a particular interest in the preparation of that part of the summary. But primarily the responsibility at the staff level for the preparation of the entire document is vested in the Office of Review. It prepares a draft which is then circulated to each Board member, who submits his comments to the Office of Review for incorporation in the final drafts.

BY MR. GOLDBLOOM:

Q Does the same practice go with respect to a statement?

THE WITNESS:

A The same with a statement.

And it then does prepare the final draft which is issued by the Secretary.

Q Is that a Board-adopted document?

A It is.

MR. SCHAUMBERG: When you say "that", Mr. Goldbloom, what do you mean?

BY MR. GOLDBLOOM:

Q Either the summary or the statement, are those—is either the summary of facts and reasons or the statement of facts and reasons adopted as a document issued by the Renegotiation Board?

THE WITNESS:

[163] A The Board members will acknowledge that this document will be issued to the contractor, and initial the draft which is submitted to them.

Q I see.

A And they know that that will go out as a Board document.

Q I see.

Now, you are familiar with Part 1a and Part 2 of the Report of Renegotiation, in general. You are familiar with the report of the Panel Division, and you are familiar with the report of the Office of Review, and the reviewer's analysis of a case.

Is the summary or statement issued by the Board a restatement of those various memoranda?

A Well, there is no attempt to summarize those memoranda, if that's what you mean. It's a fresh document.

Q It is prepared anew

A It's prepared anew. Now, obviously some of the points in the case that may have been discussed in some document here and there may get into the summary, but the document, the summary itself, is a new document.

Q Does the summary or statement, when it is passed around among the various Board members, ever get edited?

A Well, Board members may revise a sentence or correct typographical errors, or make some changes here and there [164] in the summary. Yes. In that sense it is edited by individual Board members.

Q Mr. Chairman, you spoke about the library of the Renegotiation Board. Are you familiar with the types of documents which the Board makes available to the public in this library?

A I am, generally, familiar with those documents.

Q Could you list them for us?

MR. SCHAUMBERG: I would like to object to the question, Mr. Goldbloom, since as you have so often reminded me, we are here to discuss the Board's minutes and not its general and overall compliance with the Freedom of Information Act.

MR. GOLDBLOOM: Well, the question is in this case to what extent has the Board complied with the mandate of the Court of Appeals in this case.

MR. SCHAUMBERG: If that is the question, then I would like to go back to some of my older questions.

MR. GOLDBLOOM: Well, the question before the Court that you have raised is compliance with the order of the Court of Appeals. To the extent that this Board has complied with the order of the Court of Appeals in the face of your charges that it has not, this witness, the Chairman of the Board, is entitled to say in what manner the Board has complied with them.

MR. SCHAUMBERG: Yes, but the Court of Appeals spoke only, I believe, as you again have reminded me frequently, about the [165] Board's opinions. It didn't speak to some of the other documents that may be available in the library.

MR. GOLDBLOOM: Well, I will ask the witness to answer the question, and if you have some question about it you can raise it at the appropriate time.

MR. SCHAUMBERG: Of course you have the advantage over me there, Mr. Goldbloom, since you are his Counsel. But I think integrity would require that we both play by the same rules.

MR. GOLDBLOOM: Well, I play by the rules, and this is a natural consequence of having a witness testify.

But I think the question is fair and appropriate, and within the confines of this case.

MR. SCHAUMBERG: My objection stands.

MR. GOLDBLOOM: You may answer.

THE WITNESS:

A We have placed in the Public Information Library, with appropriate deletions, agreements determining excessive profits, orders determining excessive profits, statements of facts and reasons, letters—not-to-proceed, clearances after assignment, clearances without assignment, where there was express Board action, clearances without assignment pursuant to the delegation of authority to the Office of Screening and Exemptions, decisions on applications for commercial exemptions, decisions on new durable productive equipment [166] exemption claims, decisions on applications for stock item exemptions, special accounting agreements, and in addition to these of course, the Board's regulations, a book of interpretations, general orders that affect the public, and administrative orders that affect the public.

BY MR. GOLDBLOOM:

Q What is a Letter not to Proceed? You referred to that.

THE WITNESS:

A A Letter not to Proceed is a letter informing the contractor that the Board does not intend to proceed further with the case because it has determined that the contractor's renegotiable sales are below the million dollar floor.

Q And so a clearance notice is issued only when the contractor's sales are above the statutory floor?

A That is correct.

Q Now,—

A Excuse me now, just one refinement: where contractors are under common control, and where the group is over the floor, some individual members of ate group may have renegotiable sales of less than one million dollars, but that member of the group in that case would

receive a clearance. It is over the floor by virtue of the fact that it is under common control.

Q With respect to unilateral orders issued by the [167] Board that are now placed in the Board's—in the Board's library, is there an indication of dissenting votes by Board members?

A Yes.

Q Is there an indication as to members who are present?

A Yes.

MR. GOLDBLOOM: I have no further questions.

THE WITNESS: May I be permitted to elaborate on my answer with respect to the preparation of the summaries?

MR. GOLDBLOOM: Yes.

THE WITNESS:

A I did not mean to imply by my answer that the Board members did not make substantial contributions to the drafting of the summaries. They do. In other words, it isn't solely a matter of editing or making minor changes. The changes that have been suggested could be matters of substance.

BY MR. GOLDBLOOM:

Q I see. If A Board member dissented in a given case and wanted to file a dissenting opinion when the Board submitted its summary or statement, would that dissent be sent along to the contractor with the Board's summary or statement?

THE WITNESS:

A It would.

Q So any Board member has the prerogative?

[168] A Right.

Q And that would be his dissenting opinion?

A Right.

MR. GOLDBLOOM: I have no further questions.

MR. SCHAUMBERG: Just so the record is complete, let us show that Mr. Howard W. Fensterstock, the Gen-

eral Counsel of the Board, as well as Patrick Kildea, an attorney with the Board, is present at the hearing.

REDIRECT EXAMINATION

BY MR. SCHAUMBERG:

Q Chairman Hartwig, do you recognize a document entitled "Delegation by the Renegotiation Board to Regional Boards," which was attached to our Motion for an order in accordance with the Court of Appeals, Exhibit A?

THE WITNESS:

A Yes.

Q Can you tell us what the import of that delegation is?

A Well, the delegation, of course, speaks for itself. But to summarize it, if I may, this is the Regional Board's authority with respect to certain functions, powers and duties as the caption indicates. They are empowered to issue clearances and enter into refund agreements in Class A cases, provided that the headquarters Board has advised that it is now in accord with such determination.

[169] In addition, they have authority to issue clearances and enter into refund agreements without approval of the headquarters Board in Class B cases. They also have authority to issue unilateral orders in such cases where they find that excessive profits exist.

Q So is it correct that in Class B cases there is no provise for Statutory Board confirmation, it is only in Class A cases that the Statutory Board must signify its accord with the Regional Board's determination?

A That's right.

Q You stated in response to a question posed by Mr. Goldbloom that the report of renegotiation, Parts 1a and 2, are prepared to assist the contractor in coming to an agreement with the Board with respect to the existence and thereupon the elimination of excessive profits, is that correct?

MR. GOLDBLOOM: Excuse me. I didn't realize that the witness ever testified that Part 2 was designed to assist the contractor, or even that Part I was. I think he testified that Part 1 is to make certain that the contractor and the Regional Board were operating with the same set of figures, or at least knew what the accounting issues were. But—

THE WITNESS:

A Well, this document is prepared to assist the Board in its efforts to come up with a determination and reach an agreement in a refund case.

[170] BY MR. SCHAUMBERG:

Q Could you explain what you mean by that?

A If for instance a staff document, which is designed to assist the Board in its exercising its duties to ascertain first whether there are excessive profits, and secondly what the amount of these excessive profits should be, what they should determine them to be.

Q And what is made available to the contractor so that he can enter into these discussions with the Board?

A Part 1a is made available to the contractor.

Q Is Part 2 made available.

A Part 2 is not made available. This is an intra-agency communication by the Renegotiator to his superiors, namely the Regional Board.

Q I believe you testified that the Report of Renegotiation is ordinarily more extensive in refund cases than it is in clearance cases, and I think you made that statement at about the time that you counted the pages in Files Nos. 5 and 6. Could you explain that answer?

Q Well, in the very nature of things, a refund case is much more controversial and therefore the contractors make more elaborate presentations, raise more points for consideration, and additionally of course, there is the desire to put your very best foot forward when you are proposing a refund. The contractors don't get quite as excited about clearances [171] as they do about refunds.

Q When you say "in a refund case as opposed to a clearance case," you mean a Clearance without Assignment, then?

A Clearance without Assignment, and in some instances, Clearances after Assignment.

Q Well, if it's a Clearance after Assignment, how does the renegotiator know at the time he is preparing his report what the outcome of the case will be?

A There are some instances where a report of a Clearance without Assignment will be quite extensive, and this is a case which may involve, let us say, rather serious accounting questions, perhaps exemption questions, and even factor evaluation.

Q You also testified that renegotiation is "judgmental," I believe was your word. And I believe what you were saying is that there are a number of different factors which are to be considered under the statutes, and different Board members, whether they be Regional or Statutory Board members, may give these various factors different weight. And you used that as an explanation for why it is not always possible to state that there is any opinion of the Board as a body when it has not adopted a particular summary or a particular statement of facts and reasons.

MR. GOLDBLOOM: I am sorry. I don't think that is what eh—

[172] THE WITNESS:

A I didn't say that.

BY MR. SCHAUMBERG:

Q Well, please correct me. What did you state about that?

THE WITNESS:

A I said that this is the reason why these various staff recommendations such as the Report of Renegotiation, the recommendation of the Office of Review, the comments of the Office of Accounting—this is the reason why the Board does not adopt any one of those documents. Otherwise we'd become a debating society.

Q But I understood you to say in addition to that, that—

A Yes?

Q —the Board members are not always in agreement for the results for the unilateral order, or the determination that there are excessive profits, because they each one of them may be giving different weight to different factors. Did you not say that?

A Well, there are cases where they dissent. But I was speaking of cases where there is no dissent, but where the Board members agree on the result.

Q Right.

A They may agree to a ruling, agree that it's a [173] clearance, and yet disagree with each other as to the relative weighting of the factors.

Now, let me just elaborate on this business of renegotiation being a judgment operation. Congress very clearly has said to this Board that it shall not determine excessive profits in accordance with any formula for specific percentages. This is why the factors are so broad, and this is why it is a judgment operation.

Q Now, what about the instance where the Board members agree that there are indeed excessive profits? Are you suggesting that they may come to this conclusion for different reasons?

A They might.

Q Well, I believe you testified earlier that in fact they do, since you have discussions around the table about the various reasons, etcetera, is that correct?

A They might all agree on the amount of excessive profits, but there may be some difference as to the relative weighting of the factors.

Q Well, which do they decide on first, the amount or the factors?

A They decide on the factors, and then see how it comes out, whether or not there is a concensus decision, whether there is a judgment that all can agree with, a result they all can agree with.

[174] The other thing that I want to stress with respect to the nature of this process is that our procedures are informal and non-adversary. That's another way of saying that. That's why we're not subject to the Administrative Procedures Act.

Q Are you suggesting that the publication of further documents would make it an adversary proceeding?

A I'm not suggesting that at all.

Q You quoted some statistics as to the number of cases that the Board has decided, or did have before it, over its 19-year history. Would you be able to tell us from these statistics how many dollars are accounted for by the 482 unilateral orders to which you made reference?

THE WITNESS: Let us go off the record.

(Discussion off the Record.)

THE WITNESS: Let us go back on the record. Will you repeat the question?

(The record was read by the reporter.)

THE WITNESS:

A I do not immediately have on hand the information through June 30, 1970, but I can give you an answer through June 30, 1969. That information is contained on Page 12 of the Board's 1969 Annual Report.

Through June 31, 1969 the gross amount of dollars involved in cases that resulted in agreements was $698 million, or 70% of the total. The gross amount involved in cases [175] concluded by unilateral orders was $298 million, or almost 30% of the total.

BY MR. SCHAUMBERG:

Q Referring to your earlier testimony, do you recall what you stated about the results of the number of agreements as opposed to unilateral orders?

THE WITNESS:

A I think that the number of agreements the Board has reached evidences the fact that the procedures which the Congress set up under this Act, stressing as it does the reaching of agreements, has worked.

Q In that case, would you turn to the line for fiscal year 1969, on Page 12 of the '69 Annual Report?

A All right.

Q What do those statistics indicate as to percentages of determinations by agreements versus percentage of agreements by order in dollar volume?

A Well, I think I just gave that information.

Q No, I think you gave it through 1969. I am asking you for the most recent fiscal year, at least that this publication deals with.

A Oh, you mean during that fiscal year?

Q Yes.

A In Fiscal '69 there was a total of $21 million in determinations, and $9.8 million was reached by agreement, [176] or 46% of the total. And 11.4 million by order, or 53% of the total.

Q In other words, less than half of your cases in terms of dollar amounts are now settled by agreement in 1969?

A But in terms of the number of cases, I refer you to Table 1.

Q I am asking you about Table 2, Chairman.

A Well, I have given you—

MR. GOLDBLOOM: The answers and the facts speak for themselves, but I think the Chairman is entitled to elaborate on his response.

BY MR. SCHAUMBERG:

Q I will ask you about Table 1 if you will answer my question about Table 2. Isn't it correct that over half the cases in 1969, when we are speaking about dollar volumes, were determined by unilateral order and not by agreement?

A Yes, the percentage is 53%.

Q Now, turning to Table 1 which covers these statistics rather than by dollars, by number: what is the total percentage through 1969 of the number of orders entered into by agreement and by order?

A The cumulative total through 1969 shows that there were 3,456 cases in which refunds were agreed to, or 89% of the total, and 427 orders or 11% of the total.

Q And what are the comparable figures for just fiscal [177] year 1969?

A In fiscal year '69 out of a total of 82 determinations, 54 were agreement, or 65.9% of the total. 28 were by order, or 34.1% of the total.

Q So again, would it be a correct statement to say that in 1969 three times as many cases were terminated by order than the average for your 19-year history?

MR. GOLDBLOOM: The figures speak for themselves, Counsel. I think if you want to make an argument about the figures, you are entitled to, but these are . . .

MR. SCHAUMBERG: I was just trying to complete the record. Mr. Goldbloom.

MR. GOLDBLOOM: Fine.

BY MR. SCHAUMBERG:

Q I believe you quoted some language from Board Regulation 1498.6, which is the Board's clearance notice. Could you tell me in your own words what those two paragraphs were intended to convey?

THE WITNESS:

A Well, the first paragraph, in my judgment, says that the Board may withdraw the clearance notice if it appears that the renegotiable business of the contractor for the fiscal year in the review is incorrectly stated, or if there is an incorrect statement of a material fact which has been made, presumably by the contractor.

[178] Q Now, on that point, would the same not be true if we were talking about a unilateral order of the Board determining excessive profits, that if there has been a misstatement by the contractor of a material fact, that that order would not be final either?

A I don't think so. I think that—we are not talking about fraud here, and even though there is an incorrect statement about renegotiable business, it turns out that the Board, let us say, has improperly allowed the contractor to take an exemption, the Board could not reopen the case once it issued the unilateral order.

Q That's not what Paragraph 3 refers to, however. Paragraph 3 refers to the fact that the data does not reflect correctly the renegotiable business of the contractor, or contains any incorrect statement of a material fact.

And I think you referred to these paragraphs, or counsel asked you to refer to them, to show that in these clearance notices they were somewhat ephemeral in nature because they could be reopened if there were some misstatement of fact.

I am asking you whether it wouldn't be the same if it were a unilateral order determining excessive profits, if there were a misstatement of fact, or that the data supplied by the contractor were incorrect.

A Well, again, we are in a legal question here.

MR. GOLDBLOOM: There is a section of the Act which refers to fraud.

[179] BY MR. SCHAUMBERG:

Q Mr. Hartwig, perhaps this question will take care of the problem: have there been very many instances where a clearance notice has been withdrawn because of misstatement of fact?

THE WITNESS:

A Well, we have them. But in terms of the thousands of clearance notices that we issue, there have been relatively few.

Q Would you say less than 10 in your 19-year history?

A Oh, I would say that—more than that.

Q It is a negligible amount, in any case, compared to the number of cases you have?

A "Negligible" is your word. I'd say it was a small amount.

Q All right. Thank you. You've stated that the vast majority of contractors—and I am using your words—request a summary, and then you elaborated and said that approximately 85% of them ask for a summary at the Regional Board level. And perhaps—I am not certain if you said this or not—is it correct that you would estimate that a comparable number would also ask for it at the Statutory Board level?

A Well, in the first place I don't know that I said [180] flatly 85%.

Q You used the figure as an estimate.

A I thought I said it would be as much as 85%. That's what I intended. I really don't, I don't know. I haven't made a count.

Q Uh-huh.

A But I was simply illustrating that it's certainly more than 50% these days.

And the same would be true at the headquarters.

Q Well, now, I asked you during direct examination whether very many contractors who had requested a summary subsequently request a statement of facts and reasons, and I believe that you testified at the time that that is rarely the case. Now, please correct me if I'm wrong.

A I don't know whether I would say that it is rarely the case. You must remember that we do reach agreements here after we issue a summary, so, there are still a substantial number of cases where, after we've issued the summary, the contractor says, "I will agree."

So in a case like that you wouldn't have a statement of facts and reasons. Then, they, the contractors, would not ask for a statement of facts and reasons after the issuance of the order, if he doesn't intend to go to the Tax Court, and, the recent figures show that out of 582 orders to date, there were only 203 appeals.

[181] So that, in 279 of those orders, there would be no request for a statement. I don't know of a case where a contractor asked for a statement of facts and reasons unless he was headed for the Tax Court.

Now, however, we are talking about 19 years, and there may have been such a case. But I have a general impression that when such a statement is requested it's normally requested for the purpose of going to the Tax Court.

Now, just to fill out this answer: I think there are instances today where contractors do not request statements, but will take the summary and attach it to their petition in the Tax Court. As a matter of fact, that is what happened in this one refund case we examined here. I think that summary was attached to the petition in the Tax Court, and thereby began public information.

Q You stated again on cross-examination, I believe you said in your affidavit that there was always a possibility that these summaries will be changed. How frequently does that happen, that a summary is—or the facts contained in the summary change from the time that the summary is rendered by the Statutory Board and the unilateral order—if that is the result—is issued by that Board?

A Well, as a matter of statistics it would be in a small minority of cases.

Q Then as a matter of statistics, would it be correct [182] that in the vast majority of the cases the summary is an accurate reflection of the Board's views?

MR. GOLDBLOOM: Objection. The witness has testified, he has set forth what occurred. If you want to quibble about characterization of these things, that is something else.

MR. SCHAUMBERG: I think "quibble" is an unfortunate word, Mr. Goldbloom. We are here for a very good reason, we're not here to quibble.

MR. GOLDBLOOM: Of course we are.

MR. SCHAUMBERG:

Q My final question relates to the documents which you indicated are on file now in the reading room. If I may draw your attention to Section 1498. of the Board's Regulations, for instance, "Section 1498.6": while I am not either quibbling or arguing with what you have done in this regard, I would nonetheless like to ask you this question:

To the extent that you have published your clearance notices with the deletion of identifying details, have you done anything more than publish the form which appears in 1498.6? In substance, that is?

THE WITNESS:

A I believe that's correct.

Q Would the same be correct with regard to 1498.8, "Letter not to Proceed"?

A I think that is right.

[183] Q Would the same be correct to 1498.7, "Note of Clearance Determination by Regional Board, Class A Case"?

A Correct.

Q Would that be correct with regard to 1498.9, "Order of Regional Board Determining Excessive Profits"?

A I don't know that any of those have occurred recently, because those orders are usually appealed to the Statutory Board.

Q How about 1498.10, "Notice by Regional Board of Order Determining Excessive Profits"?

MR. GOLDBLOOM: Could I go back to the original question that you raised with respect to the series of documents? This is the same question. I'd just like it reread.

MR. SCHAUMBERG: Mr. Chairman, do you recall the question?

THE WITNESS:

A Wait a minute. Now, what's the question?

BY MR. SCHAUMBERG:

Q My question is whether 1498.10, Notice by regional board of order determining excessive profits, is also one of the documents that is now on file with the information previously reported in the form now completed for purposes of deleting identifying details?

A I make the same comment with respect to 1498.10 that I made with respect to 1498.9.

[184] MR. SCHAUMBERG: May I see that list you read from, please?

That is all I have.

MR. GOLDBLOOM: I have about two questions on re-cross.

RE-CROSS EXAMINATION

BY MR. GOLDBLOOM:

Q Where the Board has issued a unilateral order and it is now placed in the library, does this contain the date of the order issued by the Board?

THE WITNESS:

A Yes.

Q Does it contain the amount of dollars involved?

A Yes.

Q In the case where a summary is issued by the Board, either the Statutory or the Regional Board, which culminates in agreement, is it fair to say that the summary has achieved its purpose?

A That is the purpose of the summary.

Q Does the Board know why the contractor may have entered into the agreement?

A We assumed that the contractor agreed because he was persuaded by the summary.

Q Might he have had other reasons for agreeing?

A I don't know. He might have had other reasons.

[185] MR. GOLDBLOOM: I have no further questions.

MR. SCHAUMBERG: Thank you very much, Chairman Hartwig, for submitting to these two days of examination and cross-examination.

(Whereupon, at 7:25 p.m. the deposition was concluded.)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1595-68

GRUMMAN AIRCRAFT ENGINEERING CORPORATION,
PLAINTIFF

v.

THE RENEGOTIATION BOARD, DEFENDANT

[Filed, April 26, 1971, James F. Davey, Clerk]

OPINION

I.

The Freedom of Information Act [1] requires the Government to make available to the public "final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases."

In *Grumman Aircraft Engineering Corporation* v. *The Renegotiation Board*, —— U.S.App.D.C. ——, 425 F.2d 578 (1970), the United States Court of Appeals for the District of Columbia held that under the Freedom of Information Act Grumman Aircraft Engineering Corporation (hereinafter "Grumman") was entitled to examine "final orders and opinions" of The Renegotiation Board (hereinafter the "Board") after suitable deletions by the Board to protect confidential information. The case was then remanded to this Court for a determination of whether certain documents sought to be examined by Grumman constituted final orders and opinions.

II.

In its initial application to the Board, Grumman sought opinions and orders issued during the renegotiation of the contracts of fourteen competing companies during

[1] 5 U.S.C. § 552(a)(2)(A) (Supp. IV, 1969).

the years 1962 through 1965, as well as documents concerning its own renegotiations for the year 1965. Following the Court of Appeals decision, the Board furnished to Grumman copies of fifty-one so-called "clearance notices" and two so-called "unilateral orders" which the Board deemed to be the final orders and determinations with respect to the fourteen competitor corporations. Later the Board also furnished certain "performance reports" relating to Grumman and one "statement of facts and reasons" relating to one of the fourteen competing companies involved in renegotiations. Further, it amended its regulations in material respects to allow public access to certain of its records.[2] In light of such action, taken subsequent to the Court of Appeals decision, the Board now asserts that it has fully complied with the mandate and urges that the issues are moot. Grumman, however, takes the position that there are additional documents involved in the renegotiation proceedings involving itself and the fourteen competitor companies which constitute final orders and opinions of the Board.[3] The Board has moved for summary judgment. Grumman has moved for an order "in accordance with the mandate" of the Court of Appeals.

III.

As an aid to the resolution of the issue of what constitutes a final order or opinion the Court granted Grumman permission to depose Mr. Lawrence E. Hartwig, Chairman of The Renegotiation Board, as to the procedures followed by the Board and the type of documentation which pertains to typical renegotiation cases. The gist of Mr. Hartwig's testimony concerning renegotiation procedures [4] follows.

(1) Renegotiation in all cases is initiated at the headquarters of the Board in Washington, D.C. The cases are

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[2] 36 Fed. Reg. 3808 (1971), *infra* at 8.

[3] The Grumman demand is detailed *infra* at 9-10.

[4] This general description of procedures paraphrases detailed regulations in 32 C.F.R. §§ 1471-1475.

separated into two casegories, viz., Class A and Class B. A Class B case is one in which the renegotiable profits are less than $800,000. All others are Class A cases.

(2) When a case is filed with the Board it is first considered by the Office of Accounting to check sales, costs, and other accounting factors, and thereafter by the Office of Screening and Exemption. Those cases which appear not to involve excessive profits are screened out at headquarters through this procedure. All other cases are assigned to one of two Regional Boards usually, but not necessarily, on a geographic basis.

(3) A case assigned to a Regional Board is first handled by a two-man team made up of a renegotiator and an accountant. The accountant develops the financial information; the renegotiator develops information concerning contract performance and any other facts which may be of value in arriving at a determination. The team meets with and discusses the case with the contractor and others. When the team has compiled all the necessary information it prepares a Report of Renegotiation which consists of Part 1(a) dealing with the accounting aspects, and Part 2 dealing with the renegotiator's evaluation and recommendation.

(4) The team report is then submitted to the Regional Board.

(a) In a Class B case the Regional Board, acting under power delegated to it by the Board, either issues a clearance notice or issues a unilateral order determining excessive profits. In the latter case an appeal by an aggrieved contractor lies to the Board in Washington.

(b) In a Class A case at regional level renegotiators recommend to the Regional Board either that clearance issue or that a refund be ordered. The Regional Board, in turn, makes a report and recommendation and transmits the file and report to the Board in Washington which has reserved to itself the authority to handle Class A cases.

(5) In a Class A case in which a Regional Board has recommended a clearance, the file after reaching Wash-

ington is first sent to the Office of Accounting which prepares a memorandum addressed to the Office of Review. In that memorandum the accounting office comments upon the financial report submitted by the regional accountant and indicates whether or not it agrees with the opinion of the accountant at the regional level. The Office of Review in turn assigns a reviewer who indicates his concurrence or disagreement with the recommendation of the Regional Board, and then the Director of the Office of Review indicates his own agreement or disagreement with the Regional Board's conclusions.

The file containing the various staff recommendations is then circulated among the five members of the Board. Any member may, if he wishes, conduct an independent study. Finally, according to Mr. Hartwig, "[W]hen the recommended clearance of the Regional Board comes up on the Board agenda, the Board simply approves or disapproves the clearance. It does not adopt any of the memoranda that are before it." (Tr. at 7)[5]

In the unusual case, however, where the Board has serious questions about the Regional Board's recommendation of clearance, the Board will reassign the case to headquarters and appoint a division of its own members to meet with the contractor and investigate the case further. Once the division is satisfied that a clearance is appropriate, it prepares a report to the Board to this effect. If the Board agrees, it issues a clearance after reassignment notice.

(6) There are two other types of cases which come to Washington after regional consideration, namely (a) a Class B case where a unilateral order determining excessive profits has been issued and the contractor has indicated an appeal, and (b) a class A case where an excessive profits determination has been recommended by the Regional Office.

In such cases the Board appoints a division of its members to meet with the contractor and prepare a report to the full Board setting forth its analysis and recomendation. The case is then put on the agenda for consideration by the whole Board and ultimately is disposed of by

[5] Tr. references are to the Hartwig deposition.

the issuance of a clearance notice or the issuance of a unilateral order of determination of excessive profits. The minutes of the Board do not reflect any discussion or argument—they simply reflect the ultimate disposition of the case.

(7) 50 U.S.C. App. § 1215 provides in part:

> "Whenever the Board makes a determination with respect to the amount of excessive profits, and such determination is made by order, it shall, at the request of the contractor or subcontractor, as the case may be, prepare and furnish such contractor or subcontractor, with a statement of such determination, of the facts used as a basis therefor, and of its reasons for such determination."

This statutory provision is implemented by 32 C.F.R. 1477.2 and 1477.3.

32 C.F.R. 1477.2 involves the case in which an order has issued, and the language of the regulation simply tracks the language of the statute.

32 C.F.R. 1477.3 governs a case in which an order has not issued and it provides in part:

> "When a Regional Board has made a final determination in a Class B case or a final recommendation in a Class A case, or when the Board has made a final determination, and the contractor is unable to decide whether to enter into an agreement for the refund of excessive profits so determined or recommended, the Regional Board or the Board, as the case may be, will furnish the contractor a written summary of the facts and reasons upon which such final determination or recommendation is based in order to assist the contractor in determining whether or not it will enter into an agreement;"

The statement of facts and reasons and summaries of facts and reasons called for by the foregoing are prepared in draft form by the Board's staff and are circulated to each Board member to make whatever changes he wishes before they are finalized. Both are fresh documents in that the various memoranda in the case files are not simply summarized.

It is important to note that in no case does the Board formally adopt reports or recommendations of either the Regional Boards or its staff. It studies and considers but it does not adopt. Mr. Hartwig stated the reasons for this aspect of the Board's procedures:

"As a practical matter, . . . the Board would never get the job done as expeditiously as Congress intended for it to be done, if a Board agreement had to be secured with respect to every report which is submitted to it. Another reason that the Board operates this way is that this is a judgemental type of operation where Board members may disagree with each other respecting the evaluation of a particular statutory factor; but, nevertheless, can agree on the decision. Frequently it happens in Board discussions that one Board member will emphasize one factor more than another. Or, I know of instances where, upon review of a proposed clearance, an individual Board member might criticize the report of renegotiation because it omitted something. He may even question whether the recommendation incorporated in that report is sufficiently supported in the report itself.

"But when he makes an independent examination of the file he may find, for example, a performance report which convinces him that the recommended clearance is appropriate, even though the particular renegotiator may not have commented favorably on the contractor's performance. This will simply illustrate how these cases come before the Board.

"There may be a case where one Board member will consider that the clearances are justified, clearance is justified, in his own mind, because the overall costs are reasonable. Another Board member might not be impressed by that point, he may consider that perhaps the overall costs are not low costs, but simply reasonable costs, but be more impressed by the contribution to the defense effort than his colleague. Nevertheless, despite the differences in evaluation, they can agree on the result." [Tr. at 150-151]

IV.

As noted above, subsequent to the decision of the Court of Appeals, and while this matter was pending before this Court, the Board, under date of February 24, 1971, amended its regulation 32 C.F.R. § 1480.5 to provide as follows:

> "(a) *Records available for inspection.*
> Pursuant to 5 U.S.C. 552(a)(2), the Board will make available for public inspection and copying, the following records:
>
> (1) Agreements determining excessive profits.
> (2) Orders determining excessive profits.
> (3) Statements of facts and reasons issued by the Board.
> (4) Letters not to proceed.
> (5) Clearances after assignment.
> (6) Clearances without assignment (express Board Action).
> (7) Clearances without assignment (pursuant to delegation of authority).
> (8) Decisions on applications for commercial exemption.
> (9) Decisions on new durable productive equipment exemption.
> (10) Decisions on applications for stock item exemption.
> (11) Special accounting agreements.
> (12) Interpretations.
> (13) General Orders that affect the public.
> (14) Administrative Orders that affect the public
>
> "Without regard to the provisions of 5 U.S.C. Section 552(a)(2), the Board will also make available for public inspection and copying summaries of facts and reasons issued by the Board." 36 Fed. Reg. 3808 (1971).

So,

(1) the Court of Appeals having determined that a statement of facts and reasons is a final

order (as amended 32 C.F.R. 1480.5 (1)(a)(3) now provides); and

(2) the Board having made available to Grumman certain performance reports and unilateral orders; and

(3) the Board having made provision in 32 C.F.R. 1480.5 (1)(a) for the production of summaries of facts and reasons "without regard to the provisions of 5 U.S.C. Sec. 552 (a)"

the Board now alleges full compliance with the mandate of the Court of Appeals and the provisions of the Freedom of Information Act.

But Grumman insists that final opinions and orders of the Board embrace at least the following:

"(1) Any 'Statement of Facts and Reasons' furnished pursuant to 32 C.F.R. § 1477.2 and Section 105(a) of the Renegotiation Act of 1951 (50 U.S.C. App. § 1215(a)).

"(2) Any 'Summary of Facts and Reasons' prepared pursuant to 32 C.F.R. § 1477.3 when no 'Statement of Facts and Reasons' was subsequently furnished.

"(3) Any report and 'recommendation' prepared by a division of The Renegotiation Board pursuant to 32 C.F.C. § 1472.4(d) which does not result in a clearance and when no 'Statement of Facts and Reasons' or 'Summary of Facts and Reasons' was subsequently furnished.

"(4) Any 'report' prepared by a Regional Board pursuant to 32 C.F.R. § 1473.3(a) which results in a clearance.

"(5) Any report and 'recommendation' prepared by a division of The Renegotiation Board pursuant to 32 C.F.R. § 1472.4(d) which results in a clearance.

"(6) Any concurring or dissenting document prepared with respect to (1) through (5) above."

V.

We discuss each of the Grumman claims below.

(1) *Statement of Facts and Reasons*

The Court of Appeals specifically declared that such documents were final opinions of the Board and subject to disclosure under the Freedom of Information Act. *Grumman Aircraft Engineering Corp.* v. *The Renegotiation Board, supra*, at 579 n. 2. Accordingly, we need not discuss it further.

(2) *Summary of Facts and Reasons*

A summary of facts and reasons is furnished when a final determination of excessive profits has been made by the Board (or a Regional Board) and the contractor is unable to decide whether to enter into agreement for a refund. If the contractor refuses to enter into such an agreement a unilateral order determining excessive profits is issued.

In its amended regulation 32 C.F.R. 1480.5 (*supra*) the Board made these summaries available to the public without, however, conceding the compulsion of the Freedom of Information Act. The Board takes the position that the unilateral orders issued in the pertinent cases, and not summaries of facts and reasons furnished pursuant to 32 C.F.R. 1477.3 are the final opinions and orders of the Board.

It is to be noted that 32 C.F.R. §1477.3 used the word "final" in at least four places in describing the procedures for providing the contractor with a summary of facts and reasons, i.e.

> "When a Regional Board has made a *final* determination in a Class B case or a *final* recommendation in a Class A case, or when the Board has made a *final* determination, ... the Regional Board or the Board . . . . will furnish the contractor a written summary of the facts and reasons upon which such *final* determination or recommendation is based . . ." [emphasis supplied]

Further, it is to be noted that 32 C.F.R. 1477.4 which enumerates the items to be included "in every statement or summary furnished" makes no distinction between the two types of documents. It follows that if statements of facts and reasons are final opinions (and the Court of Appeals has so held) then clearly summaries of facts and reasons are also final opinions. To claim otherwise would fly in the face of the language of the regulations and the practical effect of the documents.

Chairman Hartwig said that the summary of facts and reasons "constitutes the Board's exposition of the case" but he maintained that it was not a final exposition because it was subject to change. (Tr. at 110) The Chairman's position, however, is unrealistic. Changes occur only in a "small minority of cases" (Tr. at 182) and in those the changed summary would logically become the final opinion.

Clearly a summary of facts and reasons expresses the Board's conclusions as to why and in what manner the contractor realized excessive profits. A unilateral order without a summary of facts and reasons would be meaningless and useless. It would tell nothing to a contractor and the public.

Accordingly, the Court holds that a summary of facts and reasons is a final opinion of the Board and available to the public under the Freedom of Information Act without reservation in all cases in which neither a statement of facts and reasons nor a modified summary is subsequently issued. In those few cases where the summary of facts and reasons is changed, the modified summary constitutes the final opinion of the Board and must be made available to the public.

(3) *Division Report and Recommendation—Excessive Profits Determination*

Once a Regional Board has recommended a determination of excessive profits in a Class A case, the Board designates a division of its members to consider the case. After studying the various memoranda, the division files with the whole Board its report and recommendation which includes a consideration of the statutory

factors laid out in 32 C.F.R. § 1460.9-1469.14. 32 C.F.R. § 1472.4(d).

If one of the division's members disagrees with the report and recommendation he may file a dissenting memorandum. The report and recommendation, as well as the dissent is then discussed by the full Board and if the Board agrees with the division a unilateral order of excessive profits is issued.

During his deposition Chairman Hartwig, in discussing this tpye of case, claimed that only the recommendation of the division but not its report was approved by the Board and that each member had his own reasons for the final action taken by the full Board, i.e., he claims the unilateral order is the Board's final exposition.

However, it appears to the Court that in this type of case the division report rather than the unilateral order is the crucial and final document. The report contains a consideration of the statutory factors, explains the reasons for the division's recommendation, and gives the facts on which that reasoning rests. This is the essence of a final opinion.

It is unrealistic to claim that because Board members might have different reasons for approval of the division's recommendation, the report of the division upon which its recommendation is based is not a final opinion. It is in fact the last document which explains reasons for the Board's decision. The report often reflects the views of a majority of the five Board members. But at the very least it reflects the analysis of one member and would thereby constitute a concurring opinion which under the Freedom of Information Act is included within the term final opinion.[6] If Board members have differing rationale for approval of the division's recommendation, they may state it in concurring opinions or memoranda.

Accordingly, the Court concludes that where neither a statement of facts and reasons nor a summary of facts

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[6] The Freedom of Information Act specifically included "dissenting and concurring opinions" under its definition of "final opinion" so that "if one or more agency members dissent or concur, the public and the parties" will "have access to these views and ideas." S. Rep. No. 813 89th Cong., 1st Sess. 7 (1965)

and reasons is issued, the report and recommendation of the division of the Board, together with any dissenting or concurring memoranda, constitutes the Board's final opinion and is available to the public under the Freedom of Information Act.

(4) *Clearance—Report of Regional Board*

When a case assigned to the Regional Board has been investigated and the Regional Board has submitted its report to the Board recommending clearance, the Board after considering all the information in the file either approves or disapproves. If it approves the recommendation the clearance notice is issued by the Regional Board.

This clearance is a decision of the Regional Board in a Class A case unless the Board is not in accord. The clearance notice is signed and issued by the Chairman of the Regional Board and states:

> "This determination has been made by this Regional Board pursuant to the due delegation of authority and The Renegotiation Board has advised the Regional Board that it is in accord with this determination." 32 C.F.R. § 1498.6(a).

The notice further states that it

> "shall constitute *final* action by the Government with respect to renegotiation pursuant to the Act for the fiscal year under review." [emphasis supplied] 32 C.F.R. § 1498.6(a).

Regional Board reports apply the statutory factors outlined in 32 C.F.R. §§ 1460.9-1460.14, are prepared and signed by a Regional Board member, and are signed on behalf of the Regional Board by its Chairman.

Such a report gives the facts and reasons for the Regional Board's recommendation and it is that recommendation which is approved by the Board. Here again a clearance notice by itself is meaningless. In order for the public to be fully informed, the reasons behind the clearance notice must be made available and in this type of case such facts and reasons are found in the Regional Board's report.

Accordingly, the Court concludes that a Regional Board report which results in a clearance notice constitutes the final opinion of the Board in a clearance case of this nature and must be made available to the public under the Freedom of Information Act.

(5) *Clearance—Division Report and Recommendation*

When the Board has reassigned a case to headquarters because it questions the Regional Board's recommendation for clearance, the Board appoints a division of its members to investigate the case and prepare a report for the Board. If the report recommends clearance and the Board agrees that it is appropriate, a clearance after reassignment notice is issued by the Board.

This procedure is similar to a determination by the Board that excessive profits have been realized. The reasoning of the Court applied to that situation, *supra*, applies equally well in this instance. The division report is prepared by a member of the Board. It is the final Board document which lays out reasons for the Board's actions. It usually represents the reasons why at least a majority of the Board decided clearance should issue. If not specifically adopted by a majority of the Board, it at least represents one member's analysis of the issues and reasons for deciding that a clearance notice should issue and would be a concurring opinion.

Accordingly, the Court holds that a report and recommendation of a division which results in a clearance after reassignment notice constitutes a final opinion within the meaning of the Freedom of Information Act and must be made available to the public.

VI.

To recapitulate, what the Court considers a final opinion is that document which states conclusions and reasons upon which the Board has acted as well as any dissents and concurrences thereto. Depending on the circumstances of any given case that document may be a summary of facts and reasons when no subsequent statement of facts and reasons is prepared; or it may be a

report and recommendation of a division which does not result in a clearance and when neither a statement of facts and reasons, nor a summary of facts and reasons is prepared, or it may be the report of a Regional Board which results in a clearance, or it may be the report and recommendation of a division which results in a clearance. The essential factor is whether or not it represents the final conclusion and reasoning on which the final determination of the Board is based.

VII.

There is a statutory exemption in the Freedom of Information Act which protects trade secrets and commercial or financial information obtained from a person which is privileged or confidential.[7] The Court of Appeals in *Grumann* v. *The Renegotiation Board*, *supra*, at 581, discussed this exemption and noted that final orders and opinions should only be made available after confidential detail has been deleted. The holding of this Court as to what constitutes final opinions and orders in this particular instance must, of course, be read in the light of that statutory exemption.

VIII.

Collateral to the issues in this case the Court's attention has been called to the fact that when the Board does make information public it does so through an indexing system which makes it extremely difficult for the public to locate and identify desired information. This Court does not claim any expertise in the matter of indexing, but it does suggest that in connection with information required to be made available, the Board should use its best efforts to make the information easily available through a simplified indexing system.[8]

---

[7] 5 U.S.C. § 552(b)(4) (Supp. IV, 1969).

[8] Counsel for Grumman suggested the Standard Industrial Classification Code which the Board used previously in making information available to Congress. See Joint Committee on Internal Revenue Taxation Report on The Renegotiation Act of 1951, H.R. Doc. No. 332, 87th Cong., 2nd Sess. Appendix C, 81-97 (1962).

Counsel for plaintiff will submit an appropriate order within ten days.

/s/ [Illegible]
JUDGE

Dated: April 26, 1971.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1595-68

GRUMMAN AIRCRAFT ENGINEERING CORPORATION,
PLAINTIFF

v.

THE RENEGOTIATION BOARD, DEFENDANT

MOTION FOR REHEARING

Comes now defendant, by its undersigned attorneys, and respectfully moves the Court for a rehearing pursuant to Rule 59, Federal Rules of Civil Procedure, for the purpose of considering a Claim of Executive Privilege asserted by defendant against the disclosure to the public of Division Reports and Recommendations and Reports of Renegotiation, as described in this Court's Opinion of April 26, 1971.

In support of this motion, the Court is respectfully referred to the Affidavit and Claim of Privilege attached hereto and to the Memorandum of Points and Authorities filed herewith.

Respectfully submitted,

L. PATRICK GRAY, III
Assistant Attorney General

HARLAND F. LEATHERS

IRWIN GOLDBLOOM
Attorneys, Department of Justice

Attorneys for Defendant

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1595-68

GRUMMAN AIRCRAFT ENGINEERING CORPORATION,
PLAINTIFF

v.

THE RENEGOTIATION BOARD, DEFENDANT

AFFIDAVIT AND CLAIM OF PRIVILEGE

I, Lawrence E. Hartwig, being duly sworn, deposes and says:

1. I am the Chairman of the Renegotiation Board, an independent agency within the executive branch of the Government, and as such am familiar with the policies, regulations, operations and procedures of the Board. I have examined the opinion of the United States District Court for the District of Columbia in this action which was filed April 26, 1971.

2. The court held in that opinion, *inter alia*, that under certain circumstances Division Reports and Recommendations and Reports of Renegotiation prepared in a Regional Renegotiation Board constituted final opinions of the Renegotiation Board within the meaning of the Freedom of Information Act, 5 U.S.C. 552, and should therefore be made available to the public.

3. Such Division Reports and Recommendations and Reports of Renegotiation are internal records of the Renegotiation Board which are prepared for and designed to assist the members of the Board in their deliberations. They are intra-agency memoranda and communications consisting of advisory opinions, conclusions, recommendations, and analyses prepared by staff personnel or members of a Division of the Board which the entire Renegotiation Board uses for the purposes of discussion and consideration in arriving at a conclusion as to the existence of excessive profits in a given case. The release of

the content of such documents to the public would be injurious to the public interest since, if the Renegotiation Board is to receive frank recommendations and suggestions from its staff and members, the Division Report and Recommendation and Report of Renegotiation must be immune from public disclosure. Any impairment of the free flow of comments, recommendations and suggestions by personnel on the staff or members of the Board to the Board, acting as a body, would adversely affect the ability of the Renegotiation Board to carry out its mandate under the Renegotiation Act. In addition, since the Renegotiation Board, acting as a body, does not adopt the contents of the Division Reports or the Reports of Renegotiation which are submitted to it for its consideration in determining the existence of excessive profits, the release of the contents of such documents to the public would be injurious to the public interest since it might misinform the public as to the grounds on which the Renegotiation Board, acting as a body, made a determination.

4. Accordingly, in the exercise of my responsibilities as Chairman of the Renegotiation Board, I therefore respectfully assert executive privilege as the ground for the nondisclosure of such Division Reports and Recommendations and Reports of Renegotiation.

/s/ Lawrence E. Hartwig
LAWRENCE E. HARTWIG

Subscribed and sworn to before me, a notary public in and for the District of Columbia, on this 17th day of May 1971.

Signed: Helen V. Allen
Notary Public

My commission expires
May 14, 1974

[SEAL]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1595-68

GRUMMAN AIRCRAFT ENGINEERING CORPORATION,
PLAINTIFF

v.

THE RENEGOTIATION BOARD, DEFENDANT

OPPOSITION TO DEFENDANT'S MOTION FOR REHEARING

Plaintiff, Grumman Aircraft Engineering Corporation, hereby opposes defendant's motion for rehearing on the grounds that defendant has not raised any reason "for which rehearings have heretofore been granted in suits in equity" pursuant to Rule 59(a)(2) F.R.C.P. and on the grounds that the granting of this motion after this Court has rendered its opinion would encourage endless litigation by allowing the defendant to raise a theory previously available but not asserted after determination that the defense theory in fact asserted was as a matter of law not a defense.

In support of this motion, the Court is respectfully referred to the Memorandum of Points and Authorities filed herewith.

Respectfully submitted,

TOM M. SCHAUMBERG
REXFORD T. BROWN

Attorneys for Plaintiff
GADSBY & HANNAH

Of Counsel:

GADSBY & HANNAH

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1595-68

GRUMMAN AIRCRAFT ENGINEERING CORPORATION,
PLAINTIFF

v.

THE RENEGOTIATION BOARD, DEFENDANT

ORDER

This matter having come before the Court on remand from the United States Court of Appeals for the District of Columbia Circuit and the Court having considered defendant's motion for summary judgment, plaintiff's motion for an order in accordance with the mandate of the Court of Appeals, the other pleadings and briefs filed herein, the affidavit and deposition of Lawrence E. Hartwig, Chairman of the defendant, having heard argument of counsel, and in accordance with the opinion of this Court filed April 26, 1971, it is hereby

ORDERED this 7th day of June, 1971, that:

1. The Renegotiation Board ("Board") shall make available for public inspection and copying its final opinions and orders, including determinations, unilateral orders, agreements, clearance notices and letters not to proceed.

   (a) As used herein, the term "final opinion" means that document which states conclusions and reasons upon which the Board has acted in carrying out its statutory mandate as well as any dissents and concurrences thereto, including:

      i. Any "Statement of Facts and Reasons" furnished pursuant to 32 C.F.R. § 1477.2 and Section 105(a) of the Renegotiation Act of 1951 (50 U.S.C. App. § 1215(a)).

ii. Any "Summary of Facts and Reasons" prepared pursuant to 32 C.F.R. § 1477.3 when no "Statement of Facts and Reasons" was subsequently furnished.

iii. Any report and "recommendation" prepared by a division of the Renegotiation Board pursuant to 32 C.F.R. § 1472.4(d) which does not result in a clearance and when no "Statement of Facts and Reasons" or "Summary of Facts and Reasons" was subsequently furnished.

iv. Any "report" prepared by a Regional Board pursuant to 32 C.F.R. § 1473.2 (a) which results in a clearance.

v. Any report and "recommendation prepared by a division of the Renegotiation Board pursuant to 32 C.F.R. § 1472.4(d) which results in a clearance.

vi. Any concurring or dissenting document prepared with respect to (i) through (v) above.

(b) To the extent required to prevent a clearly unwarranted invasion of personal privacy such as disclosure of the source of date which falls within the exemption provided by 5 U.S.C. § 552(b)(4), the Board may delete identifying details when it makes its final opinions and orders available for public inspection and copying. In each case the justification for the deletion shall be fully explained in writing.

2. In accordance with Paragraph 1, above, the Board shall, within thirty (30) days of the entry of this Order, make available for public inspection and copying the final opinions and orders issued for the renegotiable years 1962 through 1965 involving the following companies:

Douglas Aircraft Company
The Boeing Company
Lockheed Aircraft Corporation

Ling-Temco-Vought, Inc.
North American Aviation, Inc.
Fairchild Hiller Corporation
Republic Aviation Corporation
Martin Marietta Corporation
General Dynamics Corporation
McDonnell Company
Northrup Corporation
Bell Aerospace Corporation
Litton Industries, Inc.
Avco Corporation

3. The Board shall forthwith amend its Regulations, Title 32, Chapter XIV, Subchapter B, Part 1480, Code of Federal Regulations, to conform with the provisions of this Order.

/s/ [Illegible]
Judge
United States District Court

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

C.A. No. 1595-68

GRUMMAN AIRCRAFT ENGINEERING CORPORATION,
PLAINTIFF

vs.

THE RENEGOTIATION BOARD, DEFENDANT

[Filed Jun. 15, 1971, James F. Davey, Clerk]

ORDER

Upon consideration of the defendant for rehearing filed herein, May 18, 1971 it is this 15th day of June, 1971,

ORDERED that the Motion be and the same hereby is denied.

JAMES F. DAVEY
Clerk

By /s/ Linda L. Payne
Deputy Clerk

HOWARD F. CORCORAN
Presiding Judge

CO-550
Rep 12/70

Copy to:

Tom M. Schaumberg
1700 Pennsylvania Ave., N.W.
Washington, D.C. 20006

Irwin Goldbloom
Rm. 3623
Department of Justice
Washington, D.C.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1595-68

GRUMMAN AIRCRAFT ENGINEERING CORPORATION,
PLAINTIFFS

v.

THE RENEGOTIATION BOARD, DEFENDANTS

MOTION FOR STAY

Defendant, by its undersigned attorneys, respectfully moves for a stay pending final resolution of any appeal which may be taken from the Order of this Court dated June 7, 1971.

The basis for this motion is that compliance with the Court's Order would, within the time allotted therein, *inter-alia*, moot any appeal which might be taken therefrom.

For these reasons, the defendant respectfully urges the Court to stay the effectiveness of its Order of June 7, 1971.

Respectfully submitted,

L. PATRICK GRAY, III
Assistant Attorney General

HARLAND F. LEATHERS

IRWIN GOLDBLOOM
Attorneys, Department of Justice
Attorneys for Defendant

No objection:

TOM M. SCHAUMBERG
GADSBY & HANNAH
1700 Pennsylvania Ave., N.W.
Washington, D.C. 20006

ORDER

Upon consideration of the foregoing motion, and it appearing that plaintiff has no objection thereto, the Order of this Court dated June 7, 1971, be and it is hereby stayed pending the final resolution of any appeal which may be taken therefrom.

D to: ————

United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1595-68

GRUMMAN AIRCRAFT ENGINEERING CORPORATION,
PLAINTIFF

v.

THE RENEGOTIATION BOARD, DEFENDANT

NOTICE OF APPEAL

Notice is hereby given that The Renegotiation Board, defendant in this proceeding, hereby appeals to the United States Court of Appeals for the District of Columbia Circuit from the order filed in this action on June 7, 1971.

IRWIN GOLDBLOOM
Attorney, Department of Justice

Attorney for Defendant

SUPREME COURT OF THE UNITED STATES

No. 73-1316

THE RENEGOTIATION BOARD, PETITIONER

v.

GRUMMAN AIRCRAFT ENGINEERING CORPORATION

ORDER ALLOWING CERTIORARI—Filed May 28, 1974

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted. The case is set for oral argument in tandem with No. 73-1233.

Mr. Justice Powell took no part in the consideration or decision of this petition.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1974 552230 296

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In the Supreme Court of the United States

OCTOBER TERM, 1973

No.

THE RENEGOTIATION BOARD, PETITIONER

v.

GRUMMAN AIRCRAFT ENGINEERING CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the Renegotiation Board, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1A–24A) is reported at 482 F.2d 710.[1] The opinion of the district court (App. C, *infra*, pp. 26A–41A) is reported at 325 F. Supp. 1146.

JURISDICTION

The judgment of the court of appeals was entered on July 3, 1973 (App. A, *infra*, p. 1A). The Board's

[1] This opinion was rendered upon appeal by the Renegotiation Board from the decision of the district court after a previous remand by the court of appeals. The first opinion of the court of appeals remanding the case to the district court is reported at 425 F.2d 578.

timely petition for a rehearing en banc was denied on September 27, 1973 (App. B, *infra*, p. 25A). On January 17, 1974, the Chief Justice extended the time for filing a petition for a writ of certiorari to February 25, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Fredom of Information Act requires the disclosure of recommendations concerning the disposition of pending cases made to the members of the agency, where the agency follows the recommendations but does not issue any opinions explaining its decisions.

STATUTE INVOLVED

The Freedom of Information Act ("FOI Act"), as amended, 5 U.S.C. 552, is reprinted at Appendix D, *infra*, pp. 42A–45A.

STATEMENT

Plaintiff instituted this suit pursuant to the Freedom of Information Act, 5 U.S.C. 552, seeking to compel the Renegotiation Board[2] ("the Board") to disclose certain documents.[3]

[2] The Renegotiation Board is "an independent establishment in the executive branch of the Government," composed of five members appointed by the President, with the consent of the Senate (50 U.S.C. App. 1217(a)). The Board is charged with the responsibility of effectuating the Congressional finding that "sound execution of the national defense program requires the elimination of excessive profits from contracts made with the United States, and from related subcontracts" (50 U.S.C. App. 1211).

[3] Grumman originally sought final orders and opinions of the Board relating to fourteen contractors and documents from

Two general types of documents are at issue here: (1) reports prepared by divisions[4] of the Board accompanying recommendations that the full Board grant a "clearance"[5] to a government contractor or determine that he earned excessive profits; (2) reports prepared by the regional subordinate subdivi-

Grumman's own renegotiation file. With respect to the final orders and opinions, the court of appeals in the first appeal in this case held that these decisions, after deletion of identifying details, were subject to public disclosure pursuant to the FOI Act and remanded the case to allow Grumman access to the documents after suitable deletions. 425 F. 2d 578.

Upon remand, the Renegotiation Board furnished the requested documents from Grumman's own renegotiation file as well as the final orders relating to the fourteen contractors. In addition, pursuant to a change in its regulations, the Board furnished Grumman with any "Summaries of Facts and Reasons" and "Statements of Facts and Reasons" issued in the case (App. C, *infra*, p. 27A). Grumman contended, however, that there were other documents in the Board's files relating to the fourteen cases which constituted final opinions within the meaning of the court of appeals' decision and moved for production of these documents. The district court interpreted "final opinions" as used by the court of appeals to include the documents at issue here. The present appeal by the Renegotiation Board from that decision of the district court followed.

[4] The Renegotiation Act of 1951, specifically authorizes the Board to establish divisions (50 U.S.C. App. 1217(e)). These divisions are composed of three of the five members of the Board, who are assigned the task in certain cases of preparing reports and recommendations prior to the issuance of a decision by the full Board (J. App. 29).

[5] The issuance of a clearance follows a Board determination that the contractor has not realized excessive profits. 32 C.F.R. Part 1473. The Board is not required to issue clearances, but without them, the contractor would be required to wait for the expiration of the statutory period of limitations contained in the Renegotiation Act before he could be assured that, in the Board's opinion, he had not earned excessive profits. See 50 U.S.C. App. 1215(c).

sions of the Board ("regional boards")[6] accompanying recommendations that the Board grant a clearance to a particular contractor. All of the reports concern Class A cases, *i.e.* those in which the Board retains sole decisional authority.[7] In all cases, the decision of the Board was in accord with the recommendation accompanying the report. All of the reports involve cases in which the contractor concerned did not request either a "Summary of Facts and Reasons"[8] or a "Statement of Facts and Reasons."[9]

[6] The Board is specifically authorized to delegate its functions to any government agency, including an agency which it creates (50 U.S.C. App. 1217(d)). The Board has exercised this authority by creating the Regional Renegotiation Boards. See 32 C.F.R. 1451.32.

[7] 32 C.F.R. 1422.232–2. Class A cases are those in which the contractor reports profits of more than $400,000. A Class B case is one in which a contractor has reported profits of less than $400,000. The Board has delegated authority to the regional board to make a final determination of excessive profits or to issue a clearance in Class B cases. 32 C.F.R. 1422.232–2; 1422.252–2. Determinations of excessive profits in Class B cases are subject to review by the Board. 32 C.F.R. 1422.272–2.

[8] A "Summary of Facts and Reasons" is issued, upon request of the contractor concerned, by a regional board when it has made a final recommendation in a Class A case or by the Board when it has made a final determination of the existence of excessive profits. The "summary" is issued before an order determining the existence of excessive profits has been issued in order to assist the contractor in determining whether or not it will enter into an agreement with the regional board or the Board. 32 C.F.R. 1477.3. "Summaries of Facts and Reasons" are prepared anew by staff personnel and are not simply summaries of various memoranda in the files.

[9] A "Statement of Facts and Reason" is similar to a "Summary of Facts and Reason" but is furnished to the contractor concerned upon request after, rather than before, an order finding the existence of excessive profits is issued. 32 C.F.R. 1477.2.

The district court rejected the Board's contention that the reports constituted intra- or inter-agency memoranda within the meaning of exemption 5 [10] of the FOI Act, 5 U.S.C. 552(b)(5), and were therefore exempt from compelled disclosure. Instead, the court held that both types of reports were final Board opinions issued in the adjudication of cases within the meaning of the FOI Act, 5 U.S.C. 552(a)(2)(A),[11] and that, therefore, their disclosure was required (App. C, *infra*, pp. 37A–41A).

With respect to the reports prepared by a division of the Board, the court held that "at the very least [the report] reflects the analysis of one member [of the Board] and * * * thereby constitute[s] a concurring opinion" which is subject to disclosure pursuant to 5 U.S.C. 552(a)(2)(A) (App. C, *infra*, p. 37A).

In sum, the court held that all the reports involved herein represent "the final conclusion[s] and reasoning on which the *final* determination[s] of the Board [are] based" (App. C, *infra*, p. 41A) and that, therefore, they are not exempt from compelled disclosure pursuant to exemption 5 as inter-agency or intra-agency memoranda.

On appeal, the Court of Appeals for the District of Columbia Circuit concurred in the district court's con-

[10] Exemption 5 applies to:

"(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency * * *."

[11] 5 U.S.C. 552(a)(2)(A) provides in relevant part:

"(2) Each agency, in accordance with published rules, shall make available for public inspection and copying—

"(A) final opinions, including concurring and dissenting opinions, * * * made in the adjudication of cases * * *."

clusions (App. A, *infra*, p. 3A). In addition, the court of appeals held the district court's judgment concerning the reports and recommendations of the regional boards to be supportable on two additional grounds. It ruled that the regional boards were "agencies" within the meaning of 5 U.S.C. 552(a)(2)(A) and that their reports to the National Board could be viewed, either, as the district court held, as final opinions of the National Board, or as final opinions of the regional boards. The court also held that exemption 5 did not apply to the documents—regardless of their status as final opinions—because, it believed, the purposes of exemption 5 would not be thwarted by public disclosure of "a document which a decision-maker treats as justification for a decision communicated outside the bureaucracy to regulated parties" even though it was "originally prepared for purposes of pre-decisional consultation" (App. A, *infra*, p. 21A).[12]

REASONS FOR GRANTING THE WRIT

This case and *National Labor Relations Board* v. *Sears, Roebuck & Co.*, No. 73-1233, in which our petition for certiorari was filed January 11, 1974, present important issues concerning the extent to which the Freedom of Information Act requires the government to disclose internal memoranda which form the basis for governmental decisions, and which are prepared as a part of the process of determining appropriate governmental actions. The decisions in this case and in

[12] The court of appeals has not interpreted its decision as limited to the special procedures of the Renegotiation Board; its judgment in *National Labor Relations Board* v. *Sears, Roebuck & Co.*, No. 73-1233, was based in part on the instant case.

Sears would seriously restrict the freedom of discussion and communication within the government which is essential to its effective functioning and which the exemptions (particularly exemption 5) were designed to protect. These decisions would thus seriously distort the workable balance between opposing interests which this Court recognized as the basic purpose of the Act in *Environmental Protection Agency* v. *Mink*, 410 U.S. 73, 80.

1. Both courts below concluded that the documents at issue here must be disclosed as final agency opinions. But the recommendations here involved are not final opinions. The division recommendations are considered by the full Board, which alone has the authority and the responsibility to issue the decision. They are prepared by individual Board members who share the ultimate responsibility for the decision, and are addressed solely to the other members with whom this responsibility is shared. They thus are pre-decisional communications between decision-makers at the highest level. See *Sterling Drug, Inc.* v. *Federal Trade Commission*, 450 F. 2d 698, 708 (C.A.D.C.). They are not in any sense the equivalent of concurring opinions, which are designed to explain to the public the writer's reasons for agreeing with the judgment of the majority.

Public disclosure of these documents will impair the decisional process of the agency. Prior to the compelled disclosure ordered by the court of appeals in this case, the author of a divisional report was responsible only for the exposition of the views of the division in terms which could be understood and which would persuade his fellow members of the Board. Under the de-

cision of the court of appeals, however, the author of the report can no longer write solely for his fellows, but must be aware of the fact that he may also be explaining a subsequent decision to the public at large. He will be forced, not simply to report the views of the division, but to assume the responsibility of justifying to the public a proposed decision of the full Board, which may or may not adopt the reasoning of the recommendation. The destruction of the pre-decisional and consultative nature of the divisional reports and recommendations will, therefore, affect adversely the efficiency and quality of the decisional process of the Board.

The same is true of the regional board reports and recommendations.[13] The court of appeals concluded that the regional boards were agencies, and that their reports and recommendations were final decisions subject to review by the National Board. Although this may be a correct analysis of the regional board functions in Class B cases, the regional boards have no independent power of decision in Class A cases (32 C.F.R. 1422.232–2).

[13] Indeed, since no member of the regional board has final responsibility for decision in a Class A case, the disclosure of regional board reports in such cases may be even more inappropriate than the disclosure of divisional reports. As the Court of Claims, per Reed, J., noted in *Kaiser Aluminum & Chemical Corp.* v. *United States*, 157 F. Supp. 939, 945–946:

"Free and open comments on the advantages and disadvantages of a proposed course of governmental management would be adversely affected if the civil servant or executive assistant were compelled by publicity to bear the blame for errors or bad judgment properly chargeable to the responsible individual with the power to decide and act."

Moreover, the recommendations do not become the final Board decision as a result of their adoption by the Board, since, as the district court found (App. C, *infra*, p. 31A):

> It is important to note that in no case does the Board formally adopt reports or recommendations of either the Regional Boards or its staff. It studies and considers but it does not adopt.[14]

Thus, the regional board reports and recommendations in Class A cases are consultative and pre-decisional only. Even if the regional boards are "agencies," within the meaning of the FOI Act, as the court of appeals held, the reports and recommendations of those regional boards cannot be considered "final opinions" within the meaning of that Act.[15]

2. The court of appeals' alternative holding, that even if these documents are pre-decisional they are not exempt from disclosure under exemption 5 of the

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[14] The court of appeals explicitly approved this finding (App. A, *infra*, p. 3A).

[15] By expanding the scope of 5 U.S.C. 552(a)(2)(A), and concluding that that section and exemption 5 are mutually exclusive, the court of appeals has seriously limited the scope of exemption 5. As a result of this decision, any agency which exercises its lawful authority to delegate some of its preliminary tasks jeopardizes the ability of those who make the delegation to consult freely with those who perform the preliminary tasks. At least one court, citing the decision in this case, has concluded that the agency in such a case has created an "agency" composed of the delegates and that reports submitted to the parent body must be disclosed as "final opinions" of that "agency." See *Washington Research Project, Inc.* v. *Department of Health, Education and Welfare*, 366 F. Supp. 929, 935 (D.D.C.) appeal filed, C.A.D.C., No. 74-1027.

FOI Act, poses an equally serious threat to effective government operations.

The court of appeals erroneously concluded that the policies underlying exemption 5 would not be jeopardized by requiring the disclosure of documents prepared for pre-decisional consultation if the decision-maker relies upon them for his decision. There is here no incorporation of the pre-decisional documents into the final decision by reference and no other indication that the decision-makers determined that the advisory documents should be considered as part of the final opinion. Cf. *American Mail Line, Ltd.* v. *Gulick*, 411 F.2d 696 (C.A.D.C.). Instead, the fact that the decision-maker's conclusions agreed with the recommendation, and no other statement of the basis therefor was issued, was apparently deemed a sufficient "adoption" of the pre-decisional documents to take them outside the scope of exemption 5 once the decision had been made and communicated to the parties involved. The court of appeals concluded that the policies supporting exemption 5 are not jeopardized when the pre-decisional document is made available after the decision has been made, and the document's "whole purpose and effect" is "to support that decision" (App. A, *infra*, p. 18A). But the timing of the disclosure is not significant—so long as the author of the document knows that it is likely to become a public document eventually, the candor and advocacy of positions essential to policy formulation are endangered.

Moreover, the purpose of the documents at issue here is, as we have shown, to make recommendations to those responsible for making the decisions, not to pro-

vide an explanation to the public of that decision. Thus they were not intended to "support" the decision eventually reached, but to suggest to the decision-makers why such a decision would be appropriate. Although the "effect" of the recommendations might be to support the decision reached, that factor is shared by all advisory memoranda which recommend the result eventually reached, and is not sufficient by itself to remove the memoranda from the scope of exemption 5.

Therefore, we submit, the construction of exemption 5 adopted by the court below is inconsistent with the major policy of that exemption, which is "to insure that federal agencies continue to enjoy the free flow of ideas essential to the making of reasoned decisions." See *Sterling Drug, Inc.* v. *Federal Trade Commission*, 450 F. 2d 698, 706 (C.A.D.C.); *International Paper Co.* v. *Federal Power Commission*, 438 F. 2d 1349, 1358–1359, (C.A. 2). That construction finds no support in the terms of the exemption or its legislative history.

3. Finally, the decisions below are likely to rigidify the Board's procedures, despite the clear contrary congressional intent. The district court held that the documents involved here were to be made available as final opinions under the Freedom of Information Act "[i]n order for the public to be fully informed [of] the reasons behind" the Board's action (App. C, *infra*, p. 39A). Since, in the court's view, the Board's orders did not provide an adequate analysis of the reasons for its actions, it concluded that the Act required the tracing of the decisional process back to an agency document

which did contain such an analysis, and the identification of that document as the agency opinion. In effect, therefore, the court held that the Act requires the agency to provide an analysis of the basis for its orders. This interpretation, affirmed by the court of appeals, reads the Act too broadly, and is particularly inappropriate when applied to the Renegotiation Board.

The emphasis of the Board's organic statute is upon negotiation rather than adjudication as the method to be used by the Board in eliminating excessive profits. See *Renegotiation Board* v. *Bannercraft Co.*, No. 72–822 decided February 19, 1974, slip op., p. 20. Moreover, as this Court emphasized in *Lichter* v. *United States*, 334 U.S. 742, the procedures used were to be informal and expeditious. Accordingly, the operations of the Board are specifically exempted from most requirements of the Administrative Procedure Act, including 5 U.S.C. 557, which requires an agency to issue findings of fact. 50 U.S.C. App. 1221.[16] The Board is required to provide reasons for its orders only when it makes a determination that excessive profits have been realized by a contractor (50 U.S.C. App. 1215(a))[17].

The district court recognized that the evidence in this record indicated that even though the Board's de-

[16] The Board is subject to the FOI Act.

[17] The instances in which an agency may be required to issue formal findings in the absence of statutory directive are rare. See *Citizens To Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 417. Since there is no need for Board opinions to facilitate judicial review, which is by trial de novo in the Court of Claims, 50 U.S.C. App. (Supp. I) 1218, there is no need for such a non-statutory requirement here.

cision accords with the division's or the regional board's recommendations, the Board decision may have been reached for reasons other than, or in addition to, those set forth in the final recommendation (App. C, *infra,* pp. 31A–32A). Therefore, the decisions below will tend to force the Board to prepare a full statement of reasons for public release in order to avoid misleading the public as to the basis for its decision. Yet Congress specifically recognized the burdens of such a practice and sought to avoid this result, 50 U.S.C. App. 1215(a), 1221. The decisions of the courts below thus erroneously apply the Freedom of Information Act to require the Board to issue the reasons for its actions in every case despite the intent of Congress, as expressed in the statute establishing the Board, to relieve the Board of this responsibility.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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FEBRUARY 1974.

APPENDIX A

In the United States Court of Appeals for the District of Columbia Circuit

No. 71-1730

GRUMMAN AIRCRAFT ENGINEERING CORPORATION

v.

THE RENEGOTIATION BOARD, APPELLANT

Argued Feb. 27, 1973—Decided July 3, 1973

Rehearing Denied Sept. 27, 1973

Before BAZELON, Chief Judge, WRIGHT, Circuit Judge, and VAN PELT,* Senior District Judge.

J. SKELLY WRIGHT, Circuit Judge. This appeal involves the validity of a District Court order requiring the Renegotiation Board to disclose documents explaining decisions of the Board and its decision-making delegates, the Regional Boards, made between 1962 and 1965, as to whether 14 companies[1] accrued excess profits in their business with the Government. These documents were sought by Grumman Aircraft Engineering Corporation under the Freedom of Information Act, 5 U.S.C. § 552 (1970), which man-

* Of the United States District Court for the District of Nebraska, sitting by designation pursuant to 28 U.S.C. § 294(d) (1970).

[1] The 14 firms are: Avco Corp.; Bell Aerospace Corp.; The Boeing Co.; Douglas Aircraft Co.; Fairchild Hiller Corp.; General Dynamics Corp.; Ling-Temco-Vought, Inc.; Litton Industries, Inc.; Lockheed Aircraft Corp.; Martin Marietta Corp.; McDonnell Co.; North American Aviation, Inc.; Northrop Corp.; and Republic Aviation Corp.

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dates that Government agencies, including the Renegotiation Board, make available for public inspection and copying "final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases * * *." 5 U.S.C. § 552(a)(2)(A). The Act also requires disclosure of "identifiable records," 5 U.S.C. § 552(a)(3), but exempts from the disclosure requirement certain specified materials, 5 U.S.C. § 552(b)(1)–(9).

This is the second time this case is before us. Initially the District Court refused to order disclosure on the ground that the requested documents contained trade secrets and other confidential information covered by the Act's exemption for "trade secrets and commercial or financial information obtained from a person and privileged or confidential," 5 U.S.C. § 552(b)(4). On appeal we held that Congress did not intend to exempt an entire document simply because it contained confidential information, that the proper procedure where exempted data is contained in the requested documents is to accommodate the Freedom of Information Act's dual policy of promoting public awareness and administrative fairness, on the one hand, and the need for justifiable secrecy on the other, by striking identifying details from the documents prior to release. We remanded the case to the District Court for further proceedings to determine precisely which of the documents or parts thereof sought by Grumman should be produced under the Act. *Grumman Aircraft Engineering Corp.* v. *Renegotiation Board*, 138 U.S. App. D.C. 147, 425 F. 2d 578 (1970).

On remand the Board agreed to produce many of the documents requested, but disagreement remained as to whether certain documents generated by the Board and its statutorily authorized decision-making delegates, the Regional Boards, in the decision-mak-

ing process were "final opinions, including concurring and dissenting opinions," producible under 5 U.S.C. § 552(a)(2)(A) or, as appellant contends, inter- or intra-agency memoranda exempt from production under 5 U.S.C. § 552(b)(5). The District Court's opinion, D.D.C., 325 F.Supp. 1146 (1971), describes at length the kinds of documents at issue and holds that the documents requested by Grumman should be produced under the Freedom of Information Act as "final opinions, including concurring and dissenting opinions," of the Renegotiation Board. Given the evident care of the District Court's delineation of the facts and its discussion of the issues, we avoid covering the same ground. We hold its findings of fact not clearly erroneous and concur in its conclusions and its judgment. Indeed, we find its judgment as to the principal documents still in dispute supportable on two additional grounds.[2]

I

The District Court ordered disclosure of Regional Board reports in Class A renegotiation cases[3] where pursuant to Renegotiation Board regulations (a) the Regional Board decides that a clearance, or finding of no excess profits liability, is proper[4]; (b) the Re-

[2] We agree, of course, with the ruling and reasoning of the District Court requiring disclosure of reports and recommendations of divisions of the Renegotiation Board and any concurrences or dissents thereto. 325 F.Supp. at 1152–1153.

[3] Cases are designated as Class A generally when a firm has derived from the Government contract under scrutiny more than $800,000 in profits. 32 C.F.R. § 1471.2(b) (1972). Where the contract has yielded less than $800,000 in profits, it is designated Class B. *Ibid.* The documents sought here all involved Class A cases.

[4] *See* 32 C.F.R. §§ 1472.3(i), 1473.2(a) (1972). Once the Regional Board has made its determination, it notifies the contractor thereof and forwards the case, along with the report at issue here, to the National Board. *Ibid.*

negotiation Board (hereinafter the National Board) notifies the Regional Board that "it is in accord with the [Regional Board's] determination"[5]; and (c) the Regional Board issues a notice to the contractor under investigation of his non-liability.[6] These reports, which the District Court found were "prepared and signed by a Regional Board member, and [were] signed on behalf of the Regional Board by its Chairman," 325 F.Supp. at 1153, were held by the District Court to be a "final opinion of the [National] Board," *ibid.*, and thus required to be produced under the Freedom of Information Act.

The National Board strongly challenges this disposition on the ground that the Regional Boards are merely advisory to the National Board, that the National Board is in fact the final decision-maker in cases of this sort, and, finally, that the unrecorded and undisclosed reasons for the National Board's agreement with the Regional Board's finding might have been different from those contained in the Regional Board report. As the District Court's opinion indicated, his argument loses much of its force when one considers the perfunctory nature of the National Board's review in such cases, the fact that in cases of this sort the National Board, in accepting the determination of the Regional Board, rejects the alternative of assigning the case to its own docket for independent consideration by a division of its membership,[7] and the fact that the determination

[5] 32 C.F.R. § 1473.2(a).

[6] *Ibid.* The form of notice issued in such cases is printed at 32 C.F.R. § 1498.6(a) (1972).

[7] The procedure followed in the kinds of cases producing the documents Grumman seeks here is in sharp contrast to the case where the National Board is not satisfied with the Regional Board's determination. In the latter case the National Board will notify the Regional Board "that it has not satis-

reflected in the clearance notice to the contractor is attributable to "the Regional Board pursuant to due delegation of authority" under National Board regulations.[8]

[1] Conceding, *arguendo,* that the Regional Board report is not tantamount to a "final opinion" of the National Board, we have no doubt that it does represent the "final opinion" of the Regional Board. Not only is the report, as the District Court found, "prepared and signed by a Regional Board member, and * * * signed on behalf of the Regional Board by its Chairman," 325 F.Supp. at 1153, but the practicalities of National Board procedure dictate this conclusion. When the Regional Board decides that a clearance should be granted in the type of case at issue here, the report is the only document in the file it forwards to the National Board which purports to justify the Regional Board's clearance recommendation in terms of the statutory standards the National Board is re-

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fied itself that the determination is correct," 32 C.F.R. § 1473.2 (a), will "direct the Regional Board to advise the contractor that a different determination may be made," *ibid.*, and in many cases will "reassign the case to the Board." *Ibid.* When this reassignment occurs, the case will generally be "assigned to a [3-man] division of the [5-man National] Board. The division will study the information and data assembled by the Regional Board and will determine what additional information or data, if any, is needed. The division will secure such additional information and data as it deems necessary and will conduct an independent study of the case. The division will not be bound or limited in any manner by any evaluation, recommendation or determination of the Regional Board." 32 C.F.R. § 1472.4(b). The deposition given by the chairman of the National Board indicates that this sort of intensive, wholly *de novo,* review is not undertaken where the National Board does not reassign the case to its own docket but merely notifies the Regional Board that it agrees with its determination and orders the Regional Board to issue notice. Appendix at 26–27, 172–173.

[8] 32 C.F.R. § 1498.6(a).

quired to apply to the facts of the case.[9] And the National Board itself acknowledges that the report is treated at the National Board level as the Regional Board's justification of its recommendation.[10] Given this function, plus the formal role it is assigned in the National Board's regulations, 32 C.F.R. § 1473.2(a), and the District Court's findings, the Regional Board report clearly occupies the same opinion status as any document produced by a decision-maker in an adjudicatory-like process and forwarded to a reviewing tribunal.

[2] For purposes of the Freedom of Information Act, the crucial question then becomes whether the Regional Board, wholly apart from the National Board, is to be considered an "agency" to which the provisions of the Act, including the requirement of disclosure of "final opinions," applies. *Compare Soucie* v. *David*, 145 U.S.App.D.C. 144, 149–153, 448 F.2d 1067, 1072–1076 (1971), with *International Paper Co.* v. *FPC*, 2 Cir., 438 F.2d 1349, 1359, cert. denied, 404 U.S. 827, 92 S.Ct. 61, 30 L.Ed.2d 56 (1971). We believe the Regional Board should be so considered.

The statutory definition of "agency" in the Freedom of Information Act is supplied in Section 2 of the Administrative Procedure Act, 5 U.S.C. § 551(1) (1970),[11] which states: "'agency' means each author-

[9] The statutory standards are set forth in the Renegotiation Board's governing statute, 50 U.S.C.App. § 1213(e)(1)–(6) (1970). This court has termed the standards "rather general" and has noted that along with the Board's regulations, *see* 32 C.F.R. § 1460.8 (1972), they vest the Board with "extremely broad discretion" in making a determination of excess profits. *Bannercraft Clothing Co.* v. *Renegotiation Board*, 151 U.S.App. D.C. 174, 178 n. 3, 466 F.2d 345, 349 n. 3 (1972), cert. granted, 410 U.S. 907, 93 S.Ct. 967, 35 L.Ed.2d 269 (1973).

[10] Brief for appellant at 13.

[11] *Soucie* v. *David*, 145 U.S.App.D.C. 144, 149–150; 448 F.2d 1067, 1072–1073 (1971).

ity of the Government of the United States, whether or not it is within or subect to review by another agency * * *." This statutory language obviously disposes of any contention that the Regional Board cannot be considered an "agency" merely because it is subject, in the kinds of cases for which the reports are sought here, to *de novo* review by the National Board. But beyond that the provision is hardly self-defining, as both this court [12] and commentators,[13] have acknowledged.

We believe that several broad guidelines as to the meaning of the term "agency" have emerged and that they compel the conclusion that the Regional Boards fit within the APA definition. The leading case, of

[12] *Soucie* v. *David*, *supra* note 11, 145 U.S.App.D.C. at 150, 448 F.2d at 1073.

[13] *See* Freedman, Administrative Procedure and the Control of Foreign Direct Investment, 119 U.Pa.L.Rev. 1, 4–18 (1970). Professor Davis has characterized the definition of "agency" supplied in the statute as "not very satisfactory." 1 K. Davis, Administrative Law Treatise § 1.01 at 1 n. 1 (1958). But the definition he suggests—"a governmental authority, other than a court and other than a legislative body, which affects the rights of private parties through either adjudication of rule-making." *id.* at 1—is probably itself too narrow, as we suggested in *Soucie* v. *David*, *supra* note 11, 145 U.S. App.D.C. at 150, 448 F.2d at 1073. The Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act, drafted in 1967 just after the Freedom of Information Act was enacted, discusses the Act's applicability to any "agency" as defined in 5 U.S.C. § 551(1), and suggests a broader definition: "every department, board, commission, division, or other organizational unit in the executive branch." *Id.* at 4. It is clear that the Regional Boards, as part of the Renegotiation Board apparatus, are "in the executive branch." 50 U.S.C. App. § 1217(a) (1970), and they are certainly organizational units. If the Renegotiation Act itself and the regulations mean anything, *see* text at pp. 714–715, *infra*, they would appear to meet the definition supplied by the Attorney General's memorandum.

course, is *Soucie* v. *David, supra,* where we held that the Office of Science and Technology in the Office of the President is to be considered an "agency" for the purposes of Section 2 of the Administrative Procedure Act and therefore for the Freedom of Information Act. *Soucie,* relying on the legislative history of the APA, reasoned that the "APA apparently confers agency status on any administrative unit with substantial independent authority in the exercise of specific functions." 145 U.S.App.D.C. at 150, 448 F.2d at 1073. We then concluded that OST met this broad standard and was not to be considered merely personal staff to the President.[14] We relied on several factors for this conclusion, including indications that Congress, in acquiescing in the presidential reorganization plan that created OST, believed that the unit would assume the independent administrative function of evaluating congressionally approved federal scientific programs. 145 U.S.App.D.C. at 151–152, 448 F.2d at 1074–1075.

The factors we relied on in *Soucie* to conclude that OST was an "agency" for purposes of the Administrative Procedure Act and thus for purposes of the Freedom of Information Act are clearly evident in this case. There is no question that the Regional Boards have been granted what *Soucie* termed "substantial independent authority." Equally, the Regional Boards fit the functional definition of "agency" proposed by the commentator who has given the question the most exhaustive study. Professor James O.

[14] *Compare International Paper Co.* v. *FPC*, 2 Cir., 438 F.2d 1349, 1359 (1971) (holding that the staff of the FPC is not to be considered an agency for purposes of either the Freedom of Information Act or the APA on the ground that it lacks any legally recognized decision-making status). *See also Miller* v. *Smith*, S.D.N.Y., 292 F.Supp. 55 (1968).

Freedman.[15] He argues that the primary task in applying the term "agency" is "to identify centers of gravity of the exercise of administrative power * * * where substantial 'powers to act' with respect to individuals are vested."[16] The National Board regulations, setting forth the powers of the Regional Boards, point unmistakably to an affirmative conclusion in this respect as well. The Regional Boards have their own investigating and negotiating personnel with whom the contractors are instructed to discuss their excess profit liability prior to decision of their cases by the Regional Boards.[17]

Following these investigations and negotiations, moreover, the members of the Regional Board are instructed to make a formal recommendation as to the contractor's excess profit liability[18] and this recommendation is communicated openly to the contractor prior to any assumption of jurisdiction by the National Board.[19] Furthermore, in many cases the Regional Boards are empowered to make final decisions not even reviewable by the National Board.[20] In other

[15] *See* note 13 *supra*.

[16] Freedman, *supra* note 13, 119 U.Pa. L.Rev. at 9.

[17] *See* 32 C.F.R. § 1472.3.

[18] 32 C.F.R. § 1472.3(i).

[19] *Ibid.*; 32 C.F.R. § 1473.2(a).

[20] The Regional Boards are given this power in Class B cases, *see* note 3 *supra*, where it decides that a clearance should be granted, 32 C.F.R. § 1473.2(b), and where it has reached an agreement with the contractor that a given amount of excess profits should be refunded, 32 C.F.R. § 1474.3(b). Review by the National Board is mandatory in Class A cases whether the Regional Board decides a clearance should be granted, 32 C.F.R. § 1473.2(a), reaches an agreement with the contractor on a specified refund, 32 C.F.R. § 1474.3(a), or decides that a refund order should be issued and is unable to reach agreement with the contractor on a specified amount, 32 C.F.R. § 1475.3(a) (1972). In Class B cases, where no agreement can be reached between the contractor and the Regional Board and the Regional Board determines that a refund of excess profits

words, the Regional Boards serve as a discrete, decision-producing layer in the renegotiation process.[21] And this is the case from the standpoint of the National Board, which often, but not always, reviews their decisions,[22] as well as from the standpoint of the regulated parties, the contractors, who conduct negotiations with the Regional Boards and are communicated the Regional Board's conclusions prior to and separate from any possible subsequent negotiations or decisions at the National Board level.

It is also clear to us that the exercise of formal decision-making power by the Regional Boards, as authorized by delegation from the National Board, was within Congress' contemplation when it established the Renegotiation Board apparatus. Evidence that Congress believed the governmental body in question would exercise authority of the kind customarily granted legislatively was an important factor in *Soucie*, as we have pointed out, and we believe it exists in ample measure here. In fact, we need go no further than the Renegotiation Act of 1951 itself for a conclusive indication that Congress foresaw and approved creation of Regional Boards with the kind of decisional authority we feel is sufficient to hold that the Regional Boards are "agencies." Section

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should be paid, the "[National] Board may review such determination upon its own motion, or, in its discretion, at the request of the contractor." 32 C.F.R. § 1475.3(b).

[21] *See also Bannercraft Clothing Co. v. Renegotiation Board*, *supra* note 9, 151 U.S. App. D.C. at 179, 466 F. 2d at 350, where we characterized the Regional Board decisions as follows: "[T]he recommendations made by the lower bureaucratic levels * * * are * * * exceedingly important to the contractor. Indeed, their importance derives from their non-finality, since it is the possibility that they will be reversed and increased which provides the incentive to accept them without resort to theoretically available *de novo* appeals."

[22] *See* note 20 *supra*.

107(d) of the statute, 50 U.S.C.App. § 1217(d) (1970), provides in pertinent part:

"The Board may delegate in whole or in part any function, power, or duty (other than its power to promulgate regulations and rules and other than its power to grant permissive exemption * * *) *to any agency of the Government, including any such agency established by the Board*, and may authorize the successive redelegation, within limits specified by it, of any such function, power, or duty to any agency of the Government, including such agency established by the Board * * *"

[Emphasis added.]

There is further reason to believe that Congress meant the term "agency" in the above quoted statute—describing the subsidiary decision-making bodies now known as Regional Boards—to have the same meaning as the term has in Section 2 of the APA. For Congress, in establishing the Renegotiation Board, had the detailed requirements of the APA at the forefront of its concern. In another section of the Renegotiation Act of 1951, 50 U.S.C.App. § 1221 (1970), it specifically excluded the Board's functions from the operation of the APA with one important exception, the APA's public information provision, which is now, of course, the Freedom of Information Act. Given this legislative attention to the APA, the choice of the word "agency" must have been purposeful, lending further support to our view that the Regional Boards are covered by the term "agency" utilized in the APA and thus must be considered "agencies" for purposes of the Freedom of Information Act.

The National Board's own regulations corroborate the conclusion that the Regional Boards, apart from the National Board, are agencies subject to the Free-

dom of Information Act. And the National Board's own view of its responsibilities, as evidenced in its regulations, is entitled to considerable weight in interpreting the relevant statutes. *See, e.g., Udall* v. *Tallman*, 380 U.S. 1, 16, 85 S. Ct. 792, 13 L.Ed.2d 616 (1965). The regulations acknowledge that pursuant to the Freedom of Information Act all clearances and agreements determining excess profits must be disclosed. 32 C.F.R. § 1480.5 (1972). In many cases these decisions to issue clearances or make agreements with contractors are solely the Regional Board's decisions and no review whatever is undertaken by the National Board.[23] Thus the regulations clearly subject to the requirements of the Freedom of Information Act documents that represent administrative actions whether taken by the National Board or exclusively by the Regional Boards. This suggests to us that the National Board itself, for some purposes at least, considers the Regional Boards "agencies" separately subject to the Freedom of Information Act's provisions.

Since we conclude that the Regional Board reports at issue here should be considered "final opinions" of an "agency" and thus subject to disclosure under 5 U.S.C. § 552(a)(2)(A), it necessarily follows that the documents cannot be exempted from disclosure as "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency" under Exemption 5 of the Act, 5 U.S.C. § 552(b)(5). Obviously, the two sections are mutually exclusive. By definition "final opinions, including concurring and dissenting opinions" cannot be "inter-agency or intra-agency memorandums."

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[23] See 32 C.F.R. §§ 1473.2(b), 1474.3(b) and the discussion in note 20 *supra*.

[3] Exemption 5 is simply irrelevant to final agency opinions because such opinions are decisional documents rather than purely pre-decisional, consultative and deliberative inter- or intra-agency memoranda. *See* Section II *infra*. The fact that determinations by the Regional Boards are in some cases reviewable by the National Board does not make the Regional Board reports on which they are based inter- or intra-agency documents under Exemption 5 and thus not disclosable final opinions of the Regional Boards, any more than lower court opinions subject to appeal are not final. Indeed, finality is ordinarily the touchstone of appealability. *See, e.g.*, 5 U.S.C. § 704 (1970); 28 U.S.C. § 1291 (1970). Moreover, the Administrative Procedure Act specifically provides that an "agency" may be reviewable by another agency, 5 U.S.C. § 551 (1) (1970), and the Freedom of Information Act requires disclosure of final orders and opinions of "each agency," 5 U.S.C. § 552(a)(2)(A), whether or not reviewable by another agency.

II

[4] We also believe the District Court's decision can stand for reasons other than the status of Regional Board reports as "final opinions, including concurring and dissenting opinions." The Freedom of Information Act mandates disclosure of a far broader category of agency papers. 5 U.S.C. § 552(a)(3) calls for production of "identifiable records." There is no question that the Regional Board reports fit into this category as Grumman pointed out in its original pleadings.[24] No argument has been made by the Renegotiation Board that the papers were not "identifiable" or that Grumman's request was insuffi-

[24] Joint Appendix at 41 in *Grumman Aircraft Engineering Corp.* v. *Renegotiation Board*, 138 U.S.App.D.C. 147, 425 F.2d 578 (1970).

ciently specific. The nature of the documents and the naming of the companies and subject matter concerned and the dates when they were prepared make clear that the Government could identify them without inordinate difficulty. *See National Cable Television Assn.* v. *FCC*, — U.S.App.D.C. —, 479 F.2d 183 (1973); *Irons* v. *Schuyler*, 151 U.S.App.D.C. 23, 465 F.2d 608, *cert. denied*, 409 U.S. 1076, 93 S.Ct. 682, 34 L.Ed. 2d 664 (1972). And it is settled that once the "identifiability" requirement is met, as it is here, the central question remaining in Freedom of Information Act litigation is whether any of the Act's exemptions apply. *See Bristol Myers Co.* v. *FTC*, 138 U.S.App. D.C. 22, 25, 424 F.2d 935, 938 (1970).

As we have indicated, appellants rely on Exemption 5. In our view this exemption for "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency" does not apply to the documents at issue, wholly apart from their status as "final opinions." We reach this conclusion on the ground that the policies underlying the exemption are simply not jeopardized by disclosure of the documents Grumman seeks here.

[5] At the outset we must acknowledge that "[d]rawing such a line between what may be withheld and what must be disclosed is not without difficulties." *EPA* v. *Mink*, 410 U.S. 73, 86, 93 S.St. 827, 835, 35 L.Ed.2d 119 (1973). At the same time it seems clear that Congress, in enacting the exemption, did not mean for agencies to refuse disclosure of documents merely on the ground that such documents were customarily circulated only within the bureaucracy. *See Bristol Myers Co.* v. *FTC*, *supra*, 138 U.S.App.D.C. at 26, 424 F.2d at 939. If agency custom were the touchstone for applicability of the exemption, the pro-disclosure policy of the Act would be easily evaded. As its language

indicates, the exemption is intended to adopt an evidentiary privilege that preceded the Freedom of Information Act. The statutory modification of the phrase "inter-agency or intra-agency memorandums or letters" with the phrase "which would not be available by law to a party other than an agency in litigation with the agency" makes clear the Act's adoption of a pre-existent privilege from discovery, and this court has so held. *Ackerly v. Ley*, 137 U.S.App.D.C. 133, 138, 420 F.2d 1336, 1341 (1969).[25] *See also EPA* v. *Mink*, *supra*, 410 U.S. at 87–90, 93 S.Ct. 827; *Tennessean Newspapers, Inc.* v. *FHA*, 6 Cir., 464 F.2d 657, 660 (1972); *GSA* v. *Benson*, 9 Cir., 415 F.2d 878, 880 (1969). And this privilege, it is also clear, aims to further a discrete set of policies. *See Kaiser Aluminum & Chemical Corp.* v. *United States*, 157 F. Supp. 939, 944–947, 141 Ct.Cl. 38 (1958); *Carl Zeiss Stiftung* v. *V.E.B. Carl Zeiss, Jena*, D. D.C., 40 F.R.D. 318, 324–327 (1966), affirmed per curiam, 128 U.S. App.D.C. 10, 384 F.2d 979, cert. denied, 398 U.S. 952, 88 S.Ct. 334, 19 L.Ed.2d 361 (1967).

The case law involving the privilege for governmental papers which underlies Exemption 5 indicates that the purpose of nondisclosure is protection of the "consultative functions" of government. *EPA* v. *Mink*, *supra*, 410 U.S. at 87–90, 93 S.Ct. 827. The privilege aims to cover "advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." *Carl Zeiss Stiftung* v. *V.E.B. Carl Zeiss, Jena*, *supra*, 40 F.R.D. at 324. Put another way, the privilege aims to protect "free discussion of prospective operations and policy." *Kaiser Aluminum & Chemical Corp.* v. *United States*, *supra*, 157 F Supp. at 947.

[25] *See also Freeman* v. *Seligson*, 132 U.S.App.D.C. 56, 69, 405 F.2d 1326, 1339 (1968).

Protecting the confidentiality of advice given during governmental deliberations prior to actual promulgation of policy is, of course, eminently sensible. For it is well recognized that pre-decisional deliberation requires privacy so that staffers and decision-makers alike may engage in free and frank consideration of alternatives.[26] Moreover, as this court suggested recently in *Sterling Drug Inc.* v. *FTC*, 146 U.S.App. D.C. 237, 245–247, 450 F.2d 698, 706–708 (1971), the public might be misled by exposure to discussions occurring before policy affecting it were actually determined. And finally, delving into predecisional policy deliberations impairs the integrity of decision-makers; officials should be judged by what they decide, not for the matters they properly considered before making up their minds.[27]

But the case for applying the privilege, and thus the exemption, is markedly weaker where the documents at stake are not solely part of the consultative

[26] *See generally Carl Zeiss Stiftung* v. *V.E.B. Carl Zeiss, Jena*, D.D.C., 40 F.R.D. 318, 325 (1966); *cf. Hickman* v. *Taylor*, 329 U.S. 495, 511, 67 S.Ct. 385, 91 L.Ed. 451 (1947). The practical underpinnings of the need for pre-decisional privacy were well stated by Mr. Justice Reed in *Kaiser Aluminum & Chemical Corp* v. *United States*, 157 F. Supp. 939, 945–946, 141 Ct.Cl. 38 (1958), where he pointed out: "Free and open comments on the advantages and disadvantages of a proposed course of governmental management would be adversely affected if the civil servant or executive assistant were compelled by publicity to bear the blame for errors or bad judgment properly chargeable to the responsible individual with power to decide and act. Government from its nature has necessarily been granted a certain freedom from control beyond that given the citizen."

[27] *See Boeing Airplane Co.* v. *Coggeshall*, 108 U.S.App.D.C. 106, 112, 280 F.2d 654, 660 (1960); *Carl Zeiss Stiftung* v. *V.E.B. Carl Zeiss, Jena*, *supra* note 26, 40 F.R.D. at 325–326. *See also United States* v. *Morgan*, 313 U.S. 409, 422, 61 S.Ct. 999, 85 L.Ed. 1429 (1941).

and deliberative process, but rather reflect actual decisions communicated outside the agency. *Carl Zeiss Stiftung* v. *V.E.B. Carl Zeiss, Jena, supra,* for example, stressed that the documents sought in that case were "pre-decision data."[28] Professor Davis has put the matter well, arguing that the exemption should apply only to "papers which reflect the agency's group thinking in the process of working out its policy and determining what its law shall be." Davis, The Information Act: A Preliminary Analysis, 34 U.Chi.L.Rev. 761, 797 (1967).

This limitation is supported by the House Committee Report on the Freedom of Information Act which stressed that "a Government agency cannot always operate effectively if it is required to disclose

[28] 40 F.R.D. at 326. Similarly, in *Kaiser Aluminum & Chemical Corp.* v. *United States, supra* note 26, the Court of Claims stressed that the document the plaintiff unsuccessfully sought there in a breach of contract suit against the Government was a "memorandum * * * written by a Special Assistant to the War Assets Liquidator. His duties, at least so far as the contracts here involved are concerned, were confined to recommendations and advice on program policy. He played no part in the operative events involved in this case and had no relations or discussions with plaintiff or its competitor." 157 F. Supp. at 943. But Mr. Justice Reed, speaking for the Court of Claims, noted that the claim of executive privilege there would rest on much weaker ground if the papers by the officials reflected actual, effective decisions: "If the Special Assistant played a part in operative events, *e.g.*, determination of costs or values, representations to Kaiser or Reynolds or survey of the plants, a different situation might exist. We therefore consider this case on the basis of a refusal by the Administrator to produce an advisory opinion on intra-office policy in relation to the sales to Kaiser and Reynolds." *Id.* at 944. *See also United States* v. *Procter & Gamble Co.*, D.N.J., 25 F.R.D. 485, 489 (1960) (noting that the privilege should not apply when the Government document at issue "did not evidence an operative decision").

documents or information which it has received or generated *before it completes* the process of awarding a contract or issuing an order, decision or regulation. This clause [Exemption 5] is intended to exempt from disclosure this and other information and records wherever necessary without, at the same time, permitting indiscriminate administrative secrecy." H.R. Rep.No.1497, 89th Cong., 2d Sess., 10 (1966). (Emphasis added.) And the policies supporting Exemption 5 as well as its predecessor privilege—the practical need for privacy in the formulation of policy, avoiding misleading the public, and judging officials for what they actually decide rather than what they say or write to themselves beforehand—are not jeopardized when, after a decision has been communicated to the public by a decision-maker, a document whose whole purpose and effect, as with the Regional Board reports, here, are to support that decision is disclosed. *See* Note, The Freedom of Information Act and the Exemption for Intra-Agency Memoranda, 86 Harv.L. Rev. 1047, 1057–1061 (1973).

[6] Thus for purposes of applying Exemption 5 we believe a distinction must be drawn between documents composed exclusively for purposes of assisting policy formulation and those which serve to reflect policy already made and announced.[29] *Cf. Tennessean*

[29] We believe the line we draw between "pre-decisional" and "decisional" documents is fully consistent with our decision in *Sterling Drug Inc.* v. *FTC*, 146 U.S.App.D.C. 237, 450 F.2d 698 (1971). There we held that memoranda of the FTC staff, which, unlike the Regional Boards, is not assigned any decisional responsibility, were privileged under Exemption 5. In the circumstances of that case, it was clear that the staff memoranda were not meant or likely to reflect accurately the agency decisions in which the plaintiffs were interested. Moreover, the staff-produced papers were clearly drafted for "consultative" purposes: some of them were written before the FTC members approved a merger and some were written after

Newspapers, Inc. v. *FHA*, *supra*, 464 F.2d at 660–661. Indeed, in view of our obligation "to delimit the exception as narrowly as consistent with efficient Government operation," *EPA* v. *Mink*, *supra*, 410 U.S. at 89, 93 S.Ct. at 837, *quoting* S.Rep. No. 813, 89th Cong., 1st Sess., 9 (1965), it is incumbent on us to

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the merger approval but before the FTC initiated proceedings against a second merger and served to compare the two mergers. Judge Tamm concluded that in such circumstances the dangers of misleading the public and embarrassing pre-decision communications between staff and decision-maker were apparent, and the FTC's invocation of Exemption 5 was proper. But he made made clear that he agreed with the comment in Chief Judge Bazelon's concurring and dissenting opinion that if "the memoranda had been adopted as policy," 146 U.S.App.D.C. at 252 n. 8, 450 F.2d at 713 n. 8, the exemption should not apply. 146 U.S.App.D.C. at 245, 450 F.2d at 706. On similar grounds *Sterling Drug* also held that two memoranda prepared by individual commissioners comparing the two mergers were not only purely consultative in nature, but were not likely to reflect fully the reasons either of the decision-makers voted to allow the previous merger. 146 U.S.App.D.C. at 246, 450 F.2d at 707.

Of course, neither of the kinds of documents *Sterling Drug* held were covered by Exemption 5 could fairly be termed decisional in the sense that they were treated as the end product of the decisionmaker's deliberation and utilized to justify a decision openly taken. Disclosing papers of this sort, we have said, cannot be held to intrude on frank pre-decisional communications and deliberations whose exposure may be both misleading and embarrassing. Once there is solid reason to believe a paper is considered by a decision-maker to be the basis for his decision and utilized as a justifying document, it is clear the paper can no longer be said to demonstrate merely the preliminary deliberations of a decision-maker or his staff, on which publicity may have a future chilling effect, but acquires a more formal, finished status which a decision-maker should be more ready to have attributed to himself. *See* Note, The Freedom of Information Act and the Exemption for Intra-Agency Memoranda, 86 Harv.L.Rev. 1047, 1060–1061 (1973).

Sterling Drug certainly recognizes this distinction. Judge

enunciate such a limitation.[30] Of course, the line is not always a bright one. Some papers can serve both functions—assisting pre-decisional deliberation and unambiguously rationalizing announced decisions. For example, in *American Mail Line, Ltd.* v. *Gulick*, 133 U.S.App.D.C. 382, 411 F.2d 696 (1969), what began as a staff memorandum in the pre-decisional stage was

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Tamm's panel opinion not only endorsed Chief Judge Bazelon's "adoption as policy" test. Equally important, the court ordered the District Court on remand to consider disclosure of documents issued by the FTC as a whole to private parties indicating its approval of the first merger. Judge Tamm noted that with material of this sort "the danger that any explanation they may give of [the initial merger] is not the correct one is greatly reduced. We also feel the policy of promoting the free flow of ideas within the agency does not apply here, for private transmittals of binding agency opinions and interpretations should not be encouraged." 146 U.S.App.D.C. at 247, 450 F.2d at 708. In our case, of course, the entire Regional Board reports are not ordinarily transmitted to regulated parties. But this difference is not crucial. *Sterling Drug's* paramount significance for purposes of this case is its stress on two factors: the likelihood that the papers are accurate representations of what the decision-maker used as the basis for his action and the likelihood that distinctively pre-decisional communications will not be jeopardized. Put another way, this aspect of *Sterling Drug* and our decision today both deal with papers whose unmistakable effect is to indicate that the "free flow" of pre-decisional consultation has ceased and a decision has jelled.

[30] This limitation is not the only well recognized limitation on Exemption 5. In *EPA* v. *Mink*, 410 U.S. 73, 93 S.Ct. 827, 35 L.Ed.2d 119 (1973), the Supreme Court, following the lead of *Soucie* v. *David*, *supra* note 11, and *Bristol Myers Co.* v. *FTC*, 138 U.S.App.D.C. 22, 424 F.2d 935 (1970), noted that even where a document does contain pre-decisional advice or recommendations it does not follow that the entire document may be suppressed. "[P]urely factual, investigative matters" also contained in the document may be disclosed under the Freedom of Information Act, so long as the advisory, policy-type materials are deleted. 410 U.S. at 87-94, 93 S.Ct. 827, 35 L.Ed.2d 119.

transformed into a document that had to be disclosed by the agency's admission in its publicly communicated order that its decision was based on the memorandum.

[7] In other cases, the basis of the decision may not be so openly admitted. But the difficulty of line-drawing between documents that reflect only pre-decisional deliberation and those which reflect decisions communicated to the public should not eviscerate the principle. And the principle is a simple one: a document which a decision-maker treats as justification for a decision communicated outside the bureaucracy to regulated parties should not be shielded from public disclosure on the ground that it was originally prepared for purposes of pre-decisional consultation, because the agency has customarily not disclosed the document, or because the agency labels the document other than what it really is. Therefore, since the Regional Board reports clearly reflect and are used to justify decisions of the Regional Board communicated to the contractors under scrutiny, they must fall outside the scope of Exemption 5 and should be disclosed as "identifiable records."

III

[8] Several weeks after the District Court's opinion rejecting the Government's argument that the documents Grumman sought should remain privileged under Exemption 5 was issued, the Government moved for rehearing under Rule 59, Fed.R.Civ.P., requesting the District Court to consider a formal claim of executive privilege by the chairman of the Renegotiation Board for the first time during the litigation. In our view, the District Court properly denied the motion for rehearing as untimely without considering its merits.

[9] Ordinarily Rule 59 motions for either a new trial or a rehearing are not granted by the District Court where they are used by a losing party to request the trial judge to reopen proceedings in order to consider a new defensive theory which could have been raised during the original proceedings. *Echevarria v. United States Steel Corp.*, 7 Cir. 392 F.2d 885, 892 (1968); *Rue v. Feuz Construction Co.*, D. D.C., 103 F.Supp. 499, 502 (1952). *See also* 6A J. Moore, Federal Practice ¶ 59.07 (1972). The Government attempts to avoid applicability of this well established principle, one that is required for the orderly disposition of judicial business, by arguing that it had no "occasion" to raise the executive privilege claim before the District Court opinion was handed down.

[10, 11] We disagree. First of all, the Government had sufficient "occasion" to raise all its legal claims long before the District Court took the case under advisement. On remand from this court's original decision, the District Court ordered a deposition taken from the chairman of the Renegotiation Board to shed more light on the Board's decisional process to help the court determine whether the documents sought were final opinions. During the deposition proceedings the Board chairman argued, as the Government does here, that allowing production of the documents sought by Grumman would mean disclosure of what he felt were essentially advisory, consultative papers. But the Government chose not to argue executive privilege in the memorandum of points and authorities subsequently submitted to the court or in oral argument before the District Court. It could not have been unaware of the possible relevance of executive privilege to its case, for it did invoke Exemption 5 of the Freedom of Information Act. And the history and language of that exemption make clear that Congress

did intend to codify at least some components of the executive privilege doctrine as it had been applied in pre-Freedom of Information Act cases. *See Ackerly v. Ley, supra,* 137 U.S.App.D.C. at 138, 420 F.2d at 1341. Since we cannot disturb the District Court's ruling on a Rule 59 motion absent a finding of abuse of discretion, *see Atchison, Topeka & Santa Fe R. Co. v. Jackson,* 10 Cir., 235 F.2d 390, 394 (1956); *Mayer v. Higgins,* 2 Cir., 208 F.2d 781 (1953); *see also Zenith Radio Corp. v. Hazeltine Research, Inc.,* 401 U.S. 321, 331, 91 S.Ct. 795, 28 L.Ed.2d 77 (1971), plainly no reversal is called for.

We are asked to hold that the ordinary standards governing a District Court's decision on a Rule 59 motion have no application because of the unique nature of an executive privilege claim. Properly noting that executive privilege, like the narrower privilege against disclosure of military secrets, "is not to be lightly invoked," *United States v. Reynolds,* 345 U.S. 1, 7, 73 S.Ct. 528, 532, 97 L.Ed. 727 (1953), the Government says that it follows that the rule requiring clearly available defenses raised in time for trial courts to pass on them in the normal course of proceedings has no place. We are given no reasoning or serious policy arguments to support this conclusion. Just because the assertion of executive privilege, with its constitutional overtones, is a matter of obvious gravity, *see Soucie v. David, supra,* 145 U.S.App. D.C. at 149, 448 F.2d at 1072, and like any constitutional claim should not be used to dispose of a case where a statutory claim can do equal service, it hardly follows that the Government should be allowed to play cat and mouse by withholding its most powerful cannon until after the District Court has decided the case and then springing it on surprised opponents and the judge. In saying this, we do not mean to

suggest that this particular cannon, in the context of this case, is any more than a popgun. If the claim were indeed of such gravity as the Government now suggests, we can only wonder why the Government failed to alert the District Court in a less extraordinary manner.

Affirmed.

APPENDIX B

In the United States Court of Appeals for the District of Columbia Circuit

No. 71-1730 September Term, 1973

(Civil Action 1595-68)

GRUMMAN AIRCRAFT ENGINEERING CORPORATION

v.

THE RENEGOTIATION BOARD, APPELLANT

Before: BAZELON, Chief Judge; WRIGHT, Circuit Judge and VAN PELT*, Senior United States District Judge for the District of Nebraska.

ORDER

Filed September 27, 1973

On consideration of appellant's petition for rehearing, it is

ORDERED by the Court that appellant's aforesaid petition is denied.

Per Curiam

For the Court:

HUGH E. KLINE,
Clerk.

ROBERT A. BONNER,
Chief Deputy Clerk.

*Sitting by designation pursuant to Title 28 U.S. Code Section 294(d).

APPENDIX C

In the United States District Court for the District of Columbia

Civ. A. No. 1595–68

GRUMMAN AIRCRAFT ENGINEERING CORPORATION, PLAINTIFF

v.

THE RENEGOTIATION BOARD, DEFENDANT

April 26, 1971

OPINION

CORCORAN, District Judge.

I.

The Freedom of Information Act[1] requires the Government to make available to the public "final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases."

In *Grumman Aircraft Engineering Corporation* v. *Renegotiation Board*, 138 U.S.App.D.C. 147, 425 F.2d 578 (1970), the United States Court of Appeals for the District of Columbia held that under the Freedom of Information Act Grumman Aircraft Engineering Corporation (hereinafter "Grumman") was entitled to examine "final orders and opinions" of The Renegotiation Board (hereinafter the "Board") after suitable deletions by the Board to protect confidential information. The case was then remanded to this Court for a determination of whether certain docu-

[1] 5 U.S.C. § 552(a) (2) (A) (Supp. IV, 1969).

ments sought to be examined by Grumman constituted final orders and opinions.

II.

In its initial application to the Board, Grumman sought opinions and orders issued during the renegotiation of the contracts of fourteen competing companies during the years 1962 through 1965, as well as documents concerning its own renegotiations for the year 1965. Following the Court of Appeals decision, the Board furnished to Grumman copies of fifty-one so-called "clearance notices" and two so-called "unilateral orders" which the Board deemed to be the final orders and determinations with respect to the fourteen competitor corporations. Later the Board also furnished certain "performance reports" relating to Grumman and one "statement of facts and reasons" relating to one of the fourteen competing companies involved in renegotiations. Further, it amended its regulations in material respects to allow public access to certain of its records.[2]

In light of such action, taken subsequent to the Court of Appeals decision, the Board now asserts that it has fully complied with the mandate and urges that the issues are moot. Grumman, however, takes the position that there are additional documents involved in the renegotiation proceedings involving itself and the fourteen competitor companies which constitute final orders and opinions of the Board.[3] The Board has moved for summary judgment. Grumman has moved for an order "in accordance with the mandate of the Court of Appeals.

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[2] 36 Fed.Reg. 3808 (1971), *infra* at 1150.

[3] The Grumman demand is detailed *infra* at 1151.

III.

As an aid to the resolution of the issue of what constitutes a final order or opinion the Court granted Grumman permission to depose Mr. Lawrence E. Hartwig, Chairman of The Renegotiation Board, as to the procedures followed by the Board and the type of documentation which pertains to typical renegotiation cases. The gist of Mr. Hartwig's testimony concerning renegotiation procedures [4] follows.

(1) Renegotiation in all cases is initiated at the headquarters of the Board in Washington, D.C. The cases are separated into two categories, viz., Class A and Class B. A Class B case is one in which the renegotiable profits are less than $800,000. All others are Class A cases.

(2) When a case is filed with the Board it is first considered by the Office of Accounting to check sales, costs, and other accounting factors, and thereafter by the Office of Screening and Exemption. Those cases which appear not to involve excessive profits are screened out at headquarters through this procedure. All other cases are assigned to one of two Regional Boards usually, but not necessarily, on a geographic basis.

(3) A case assigned to a Regional Board is first handled by a two-man team made up of a renegotiator and an accountant. The accountant develops the financial information; the renegotiator develops information concerning contract performance and any other facts which may be of value in arriving at a determination. The team meets with and discusses the case with the contractor and others. When the team has compiled all the necessary information it prepares

[4] This general description of procedures paraphrases detailed regulations in 32 C.F.R. §§ 1471–1475.

a Report of Renegotiation which consists of Part 1(a) dealing with the accounting aspects, and Part 2 dealing with the renegotiator's evaluation and recommendation.

(4) The team report is then submitted to the Regional Board.

(a) In a Class B case the Regional Board, acting under power delegated to it by the Board, either issues a clearance notice or issues a unilateral order determining excessive profits. In the latter case an appeal by an aggrieved contractor lies to the Board in Washington.

(b) In a Class A case at regional level renegotiators recommend to the Regional Board either that clearance issue or that a refund be ordered. The Regional Board, in turn, makes a report and recommendation and transmits the file and report to the Board in Washington which has reserved to itself the authority to handle Class A cases.

(5) In a Class A case in which a Regional Board has recommended a clearance, the file after reaching Washington is first sent to the Office of Accounting which prepares a memorandum addressed to the Office of Review. In that memorandum the accounting office comments upon the financial report submitted by the regional accountant and indicates whether or not it agrees with the opinion of the accountant at the regional level. The Office of Review in turn assigns a reviewer who indicates his concurrence or disagreement with the recommendation of the Regional Board, and then the Director of the Office of Review indicates his own agreement or disagreement with the Regional Board's conclusions.

The file containing the various staff recommendations is then circulated among the five members of the Board. Any member may, if he wishes, conduct an

independent study. Finally according to Mr. Hartwig, "[W]hen the recommended clearance of the Regional Board comes up on the Board agenda, the Board simply approves or disapproves the clearance. It does not adopt any of the memoranda that are before it." (Tr. at 7)[5]

In the unusual case, however, where the Board has serious questions about the Regional Board's recommendation of clearance, the Board will reassign the case to headquarters and appoint a division of its own members to meet with the contractor and investigate the case further. Once the division is satisfied that a clearance is appropriate, it prepares a report to the Board to this effect. If the Board agrees, it issues a clearance after reassignment notice.

(6) There are two other types of cases which come to Washington after regional consideration, namely (a) a Class B case where a unilateral order determining excessive profits has been issued and the contractor has indicated an appeal, and (b) a Class A case where an excessive profits determination has been recommended by the Regional Office.

In such cases the Board appoints a division of its members to meet with the contractor and prepare a report to the full Board setting forth its analysis and recommendation. The case is then put on the agenda for consideration by the whole Board and ultimately is disposed of by the issuance of a clearance notice or the issuance of a unilateral order of determination of excessive profits. The minutes of the Board do not reflect any discussion or argument—they simply reflect the ultimate disposition of the case.

(7) 50 U.S.C. App. § 1215 provides in part:

> "Whenever the Board makes a determination with respect to the amount of excessive profits, and such determination is made by order, it

[5] Tr. references are to the Hartwig deposition.

> shall, at the request of the contractor or subcontractor, as the case may be, prepare and furnish such contractor or subcontractor, with a statement of such determination, of the facts used as a basis therefor, and of its reasons for such determination."

This statutory provision is implemented by 32 C.F.R. 1477.2 and 1477.3.

32 C.F.R. 1477.2 involves the case in which an order has issued, and the language of the regulation simply tracks the language of the statute.

32 C.F.R. 1477.3 governs a case in which an order has not issued and it provides in part:

> "When a Regional Board has made a final determination in a Class B case or a final recommendation in a Class A case, or when the Board has made a final determination, and the contractor is unable to decide whether to enter into an agreement for the refund of excessive profits so determined or recommended, the Regional Board or the Board, as the case may be, will furnish the contractor a written summary of the facts and reasons upon which such final determination or recommendation is based in order to assist the contractor in determining whether or not it will enter into an agreement:"
>
> The statement of facts and reasons and summaries of facts and reasons called for by the foregoing are prepared in draft form by the Board's staff and are circulated to each Board member to make whatever changes he wishes before they are finalized. Both are fresh documents in that the various memoranda in the case files are not simply summarized.

It is important to note that in no case does the Board formally adopt reports or recommendations of either the Regional Boards or its staff. It studies and considers but it does not adopt. Mr. Hartwig stated the reasons for this aspect of the Board's procedures:

"As a practical matter, * * * the Board would never get the job done as expeditiously as Congress intended for it to be done, if a Board agreement had to be secured with respect to every report which is submitted to it. Another reason that the Board operates this way is that this is a judgemental type of operation where Board members may disagree with each other respecting the evaluation of a particular statutory factor; but, nevertheless, can agree on the decision. Frequently it happens in Board discussions that one Board member will emphasize one factor more than another. Or, I know of instances where, upon review of a proposed clearance, an individual Board member might criticize the report of renegotiation because it omitted something. He may even question whether the recommendation incorporated in that report is sufficiently supported in the report itself.

"But when he makes an independent examination of the file he may find, for example, a performance report which convinces him that the recommended clearance is appropriate, even though the particular renegotiator may not have commented favorably on the contractor's performance. This will simply illustrate how these cases come before the Board.

"There may be a case where one Board member will consider that the clearances are justified, clearance is justified, in his own mind, because the overall costs are reasonable. Another Board member might not be impressed by that point, he may consider that perhaps the overall costs are not low costs, but simply reasonable costs, but be more impressed by the contribution to the defense effort than his colleague. Nevertheless, despite the differences in evaluation, they can agree on the result." [Tr. at 150–151]

IV.

As noted above, subsequent to the decision of the Court of Appeals, and while this matter was pending before this Court, the Board, under date of February 24, 1971, amended its regulation C.F.R. § 1480.5 to provide as follows:

> "(a) *Records available for inspection.* Pursuant to 5 U.S.C. 552(a)(2), the Board will make available for public inspection and copying, the following records:
>
> (1) Agreements determining excessive profits.
>
> (2) Orders determining excessive profits.
>
> (3) Statements of facts and reasons issued by the Board.
>
> (4) Letters not to proceed.
>
> (5) Clearances after assignment.
>
> (6) Clearances without assignment (express Board Action).
>
> (7) Clearances without assignment (pursuant to delegation of authority).
>
> (8) Decisions on applications for commercial exemption.
>
> (9) Decisions on new durable productive equipment exemption.
>
> (10) Decisions on applications for stock item exemption.
>
> (11) Special accounting agreements.
>
> (12) Interpretations.
>
> (13) General Orders that affect the public.
>
> (14) Administrative Orders that affect the public.
>
> "Without regard to the provisions of 5 U.S.C. Section 552(a)(2), the Board will also make available for public inspection and copying summaries of facts and reasons issued by the Board." 36 Fed.Reg. 3808 (1971). So,
>
> (1) the Court of Appeals having determined that a statement of facts and reasons

is a final order (as amended 32 C.F.R. 1480.5(1)(a)(3) now provides); and

(2) the Board having made available to Grumman certain performance reports and unilateral orders; and

(3) the Board having made provision in 32 C.F.R. 1480.5(1)(a) for the production of summaries of facts and reasons "without regard to the provisions of 5 U.S.C. Sec. 552(a)"

the Board now alleges full compliance with the mandate of the Court of Appeals and the provisions of the Freedom of Information Act.

But Grumman insists that final opinions and orders of the Board embrace at least the following:

"(1) Any 'Statement of Facts and Reasons' prepared pursuant to 32 C.F.R. § 1477.2 and Section 105(a) of the Renegotiation Act of 1951 (50 U.S.C. App. § 1215 (a)).

"(2) Any 'Summary of Facts and Reasons' prepared pursuant ot 32 C.F.R. § 1477.3 when no 'Statement of Facts and Reasons' was subsequently furnished.

"(3) Any report and 'recommendation' prepared by a division of The Renegotiation Board pursuant to 32 C.F.R. § 1472.4 (d) which does not result in a clearance and when no 'Statement of Facts and Reasons' or 'Summary of Facts and Reasons' was subsequently furnished.

"(4) Any 'report' prepared by a Regional Board pursuant to 32 C.F.R. § 1473.3 (a) which results in a clearance.

"(5) Any report and 'recommendation' prepared by a division of The Renegotiation Board pursuant to 32 C.F.R. § 1472.4 (d) which results in a clearance.

"(6) Any concurring or dissenting document prepared with respect to (1) through (5) above."

V.

We discuss each of the Grumman claims below.

(1) *Statement of Facts and Reasons*

The Court of Appeals specifically declared that such documents were final opinions of the Board and subject to disclosure under the Freedom of Information Act. *Grumman Aircraft Engineering Corp.* v. *Renegotiation Board, supra,* 425 F.2d at 579 n. 2. Accordingly, we need not discuss it further.

(2) *Summary of Facts and Reasons*

A summary of facts and reasons is furnished when a final determination of excessive profits has been made by the Board (or a Regional Board) and the contractor is unable to decide whether to enter into agreement for a refund. If the contractor refuses to enter into such an agreement a unilateral order determining excessive profits is issued.

In its amended regulation 32 C.F.R. 1480.5 (*supra*) the Board made these summaries available to the public without, however, conceding the compulsion of the Freedom of Information Act. The Board takes the position that the unilateral orders issued in the pertinent cases, and not summaries of facts and reasons furnished pursuant to 32 C.F.R. 1477.3, are the final opinions and orders of the Board.

It is to be noted that 32 C.F.R. § 1477.3 used the word "final" in at least four places in describing the procedures for providing the contractor with a summary of facts and reasons, i.e.

> "When a Regional Board has made a *final* determination in a Class B case or a *final* recommendation in a Class A case, or when the Board has made a *final* determination, * * *. the Regional Board or the Board * * *. will furnish the contractor a written summary of the facts and reasons upon which such *final*

> determination or recommendation is based * * *" [emphasis supplied]

Further, it is to be noted that 32 C.F.R. 1477.4 which enumerates the items to be included "in every statement or summary furnished" makes no distinction between the two types of documents. It follows that if statements of facts and reasons are final opinions (and the Court of Appeals has so held) then clearly summaries of facts and reasons are also final opinions. To claim otherwise would fly in the face of the language of the regulations and the practical effect of the documents.

Chairman Hartwig said that the summary of facts and reasons "constitutes the Board's exposition of the case" but he maintained that it was not a final exposition because it was subject to change. (Tr. at 110) The Chairman's position, however, is unrealistic. Changes occur only in a "small minority of cases" (Tr. at 182) and in those the changed summary would logically become the final opinion.

Clearly a summary of facts and reasons expresses the Board's conclusions as to why and in what manner the contractor realized excessive profits. A unilateral order without a summary of facts and reasons would be meaningless and useless. It would tell nothing to a contractor and the public.

[1] Accordingly, the Court holds that a summary of facts and reasons is a final opinion of the Board and available to the public under the Freedom of Information Act without reservation in all cases in which neither a statement of facts and reasons nor a modified summary is subsequently issued. In those few cases where the summary of facts and reasons is changed, the modified summary constitutes the final opinion of the Board and must be made available to the public.

(3) *Division Report and Recommendation—Excessive Profits Determination*

Once a Regional Board has recommended a determination of excessive profits in a Class A case, the Board designates a division of its members to consider the case. After studying the various memoranda, the division files with the whole Board its report and recommendation which includes a consideration of the statutory factors laid out in 32 C.F.R. § 1460.9–1469.-14. 32 C.F.R. § 1472.4(d).

If one of the division's members disagrees with the report and recommendation he may file a dissenting memorandum. The report and recommendation, as well as the dissent, is then discussed by the full Board and if the Board agrees with the division a unilateral order of excessive profits is issued.

During his deposition Chairman Hartwig, in discussing this type of case, claimed that only the recommendation of the division but not its report was approved by the Board and that each member had his own reasons for the final action taken by the full Board, i.e., he claims the unilateral order is the Board's final exposition.

However, it appears to the Court that in this type of case the division report rather than the unilateral order is the crucial and final document. The report contains a consideration of the statutory factors, explains the reasons for the division's recommendation, and gives the facts on which that reasoning rests. This is the essence of a final opinion.

It is unrealistic to claim that because Board members might have different reasons for approval of the division's recommendation, the report of the division upon which its recommendation is based is not a final opinion. It is in fact the last document which explains reasons for the Board's decision. The report often re-

flects the views of a majority of the five Board members. But at the very least it reflects the analysis of one member and would thereby constitute a concurring opinion which under the Freedom of Information Act is included within the term final opinion.[6] If Board members have differing rationale for approval of the division's recommendation, they may state it in concurring opinions or memoranda.

[2] Accordingly, the Court concludes that where neither a statement of facts and reasons nor a summary of facts and reasons is issued, the report and recommendation of the division of the Board, together with any dissenting or concurring memoranda, constitutes the Board's final opinion and is available to the public under the Freedom of Information Act.

(4) *Clearance—Report of Regional Board*

When a case assigned to the Regional Board has been investigated and the Regional Board has submitted its report to the Board recommending clearance, the Board after considering all the information in the file either approves or disapproves. If it approves the recommendation the clearance notice is issued by the Regional Board.

This clearance is a decision of the Regional Board in a Class A case unless the Board is not in accord. The clearance notice is signed and issued by the Chairman of the Regional Board and states:

> "This determination has been made by this Regional Board pursuant to the due delegation

[6] The Freedom of Information Act specifically included "dissenting and concurring opinions" under its definition of "final opinion" so that "if one or more agency members dissent or concur, the public and the parties" will "have access to these views and ideas." S.Rep.No. 813, 89th Cong., 1st Sess. 7 (1965).

> of authority and The Renegotiation Board has advised the Regional Board that it is in accord with this determination." 32 C.F.R. § 1498.6(a).

The notice further states that it

> "shall constitute *final* action by the Government with respect to renegotiation pursuant to the Act for the fiscal year under review." [emphasis supplied] 32 C.F.R. § 1498.6(a).

Regional Board reports apply the statutory factors outlined in 32 C.F.R. §§ 1460.9–1460.14, are prepared and signed by a Regional Board member, and are signed on behalf of the Regional Board by its Chairman.

Such a report gives the facts and reasons for the Regional Board's recommendation and it is that recommendation which is approved by the Board. Here again a clearance notice by itself is meaningless. In order for the public to be fully informed, the reasons behind the clearance notice must be made available and in this type of case such facts and reasons are found in the Regional Board's report.

[3] Accordingly, the Court concludes that a Regional Board report which results in a clearance notice constitutes the final opinion of the Board in a clearance case of this nature and must be made available to the public under the Freedom of Information Act.

(5) *Clearance—Division Report and Recommendation*

When the Board has reassigned a case to headquarters because it questions the Regional Board's recommendation for clearance, the Board appoints a division of its members to investigate the case and prepare a report for the Board. If the report recommends clearance and the Board agrees that it is appropriate, a clearance after reassignment notice is issued by the Board.

This procedure is similar to a determination by the Board that excessive profits have been realized. The reasoning of the Court applied to that situation, *supra*, applies equally well in this instance. The division report is prepared by a member of the Board. It is the final Board document which lays out reasons for the Board's actions.

It usually represents the reasons why at least a majority of the Board decided clearance should issue. If not specifically adopted by a majority of the Board, it at least represents one member's analysis of the issues and reasons for deciding that a clearance notice should issue and would be a concurring opinion.

[4] Accordingly, the Court holds that a report and recommendation of a division which results in a clearance after reassignment notice constitutes a final opinion within the meaning of the Freedom of Information Act and must be made available to the public.

VI.

[5] To recapitulate, what the Court considers a final opinion is that document which states conclusions and reasons upon which the Board has acted as well as any dissents and concurrences thereto. Depending on the circumstances of any given case that document may be a summary of facts and reasons when no subsequent statement of facts and reasons is prepared; or it may be a report and recommendation of a division which does not result in a clearance and when neither a statement of facts and reasons, nor a summary of facts and reasons is prepared, or it may be the report of a Regional Board which results in a clearance, or it may be the report and recommendation of a division which results in a clearance. The essential factor is whether or not it represents

the final conclusion and reasoning on which the final determination of the Board is based.

VII.

There is a statutory exemption in the Freedom of Information Act which protects trade secrets and commercial or financial information obtained from a person which is privileged or confidential.[7] The Court of Appeals in *Grumman* v. *Renegotiation Board*, *supra*, at 581, discussed this exemption and noted that final orders and opinions should only be made available after confidential detail has been deleted. The holding of this Court as to what constitutes final opinions and orders in this particular instance must, of course, be read in the light of that statutory exemption.

VIII.

Collateral to the issues in this case the Court's attention has been called to the fact that when the Board does make information public it does so through an indexing system which makes it extremely difficult for the public to locate and identify desired information. This Court does not claim any expertise in the matter of indexing, but it does suggest that in connection with information required to be made available, the Board should use its best efforts to make the information easily available through a simplified indexing system.[8]

Counsel for plaintiff will submit an appropriate order within ten days.

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[7] 5 U.S.C. § 552(b)(4) (Supp. IV, 1969).

[8] Counsel for Grumman suggested the Standard Industrial Classification Code which the Board used previously in making information available to Congress.

APPENDIX D

The provisions of the Freedom of Information Act, as amended (5 U.S.C. 552) are as follows:

§ 552. Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to,

or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying—

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; and

(C) administrative staff manuals and instructions to staff that affect a member of the public; unless the materials are promptly published and copies offered for sale. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, or staff manual or instruction. However, in each case the justification for the deletion shall be explained fully in writing. Each agency also shall maintain and make available for public inspection and copying a current index providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if—

(i) it has been indexed and either made available or published as provided by this paragraph; or

(ii) the party has actual and timely notice of the terms thereof.

(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, on request for identifiable records made in accordance, with published rules stating the time, place, fees to the extent authorized by statute, and procedure to be followed, shall make the records promptly available to any person. On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo and the burden is on the agency to sustain its action. In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member. Except as to causes the court considers of greater importance, proceedings before the district court, as authorized by this paragraph, take precedence on the docket over all other causes and shall be assigned for hearing and trial at the earliest practicable date and expedited in every way.

(4) Each agency having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding.

(b) This section does not apply to matters that are—

(1) specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

(c) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-1316

THE RENEGOTIATION BOARD,

Petitioner,

v.

GRUMMAN AIRCRAFT ENGINEERING CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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ARGUMENT

The petition for a writ of certiorari filed in this case provides no compelling reason for the granting of the writ. There is no conflict among the decisions of the courts of appeals; there is no conflict with an applicable decision of this Court; there is no important question of federal law which has not been, but should be, settled by this Court; and, furthermore, this is a case of

limited applicability. Respondent wishes to make three points in opposition to the petition for certiorari:

1. Being principally fact oriented, this case is not the type normally reviewed by this Court. As recognized by petitioner, "Both courts below concluded that the documents at issue here must be disclosed as final agency opinions" (Pet. at 7).

As a result of the first appeal of this case, *Grumman Aircraft Engineering Corp. v. Renegotiation Board*, 425 F.2d 578 (D.C. Cir. 1970), the matter was remanded to the district court to allow Grumman access to the orders and opinions of the Board. However, because the Board's regulations at the time this case was instituted did not specifically designate any particular document as a "final opinion," Grumman had the burden of identifying which documents in the Board's files constituted such final opinions for purposes of the Freedom of Information Act.[1]

Utilizing a procedure[2] sanctioned by this Court in *Environmental Protection Agency v. Mink*, 410 U.S. 73 (1973), respondent, through the oral testimony of the Board's former Chairman, demonstrated to the satisfaction of the courts below that the documents now at issue are, in fact, final opinions. In the words of the district court:

> As an aid to the resolution of the issue of what constitutes a final order or opinion the Court granted Grumman permission to depose Mr. Lawrence E. Hartwig, Chairman of The Renegotiation Board, as to the procedures followed by

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[1] 5 U.S.C. §552(a)(2)(A).

[2] *See* footnote 6, *infra.*

> the Board and the type of documentation which pertains to typical renegotiation cases.

(Pet. at 28A.) After carefully analyzing that deposition, the district court determined which documents in the Board's files constituted "final opinions" by applying the test that "a final opinion is that document which states conclusions and reasons upon which the Board has acted as well as any dissents and concurrences thereto. . . . The essential factor is whether or not it represents the final conclusion and reasoning on which the final determination of the Board is based." (Pet. at 40-41A.) The court of appeals concurred, stating:

> Given the evident care of the District Court's delineation of the facts and its discussion of the issues, we avoid covering the same ground. We hold its findings of fact not clearly erroneous and concur in its conclusions and its judgment.

(Pet. at 3A.) This Court would be required to make this same "delineation of the facts" if, upon granting the writ, it had to determine whether the documents at issue are the Board's final opinions. This function is more economically fulfilled by the lower courts and in this case was properly performed in accordance with the guidelines already set out by this Court. *Environmental Protection Agency v. Mink, supra* at 93.

2. The Board was recently described by this Court as having "unique operational methods." *Renegotiation Board v. Bannercraft Clothing Co., Inc.*, 42 U.S.L.W. 4203, 4208 (U.S. Feb. 19, 1974). Consequently, a decision determining the applicability of certain sections of the Freedom of Information Act to the extraordinary procedures[3] of this particular agency would necessarily be of limited precedential value.

[3] Unlike other administrative agencies, the Board is not subject to the Administrative Procedure Act, except the public information section thereof. 50 U.S.C. App. §1221.

Moreover, the importance of this case has been even further diminished by a recent change in the Board's regulations. The thrust of the petition for certiorari is that the courts below were incorrect in characterizing certain Board documents as "final opinions" which must be made available to the public pursuant to the Freedom of Information Act. Yet, the Board itself has abated this issue by amending its regulations to require the issuance and publication of "final opinions" in future Board cases.

In its petition to this Court the Board argued that one adverse result of the decisions below will be:

> to force the Board to prepare a full statement of reasons for public release in order to avoid misleading the public as to the basis for its decision.

(Pet. at 13.) However, even before filing its petition, the Board had already issued proposed amendments to its regulations which would require the Board to issue a "final opinion" in every case. 39 Fed. Reg. 2276-2278 (1974). In the preamble to the proposed amendments, Mr. William S. Whitehead, the Board's present Chairman, pointed out that the amendments will "create three new types of opinions which will conform functionally to the other aspects of existing procedures and to the current requirements of the Freedom of Information Act." 39 Fed. Reg. 2276 (1974).

In the preamble to the final regulations which were published on April 16, 1974, 39 Fed. Reg. 13649 (1974), Chairman Whitehead explained the effect of the amendments, as follows:

> The new regulations provide for the issuance of three new types of documents. A Final Opinion, stating the basis for a final determination of

> excessive profits, if any, and a Regional Board Opinion, stating the basis for a final recommendation of excessive profits, if any, will be furnished to the contractor at the time the Board or the Regional Board, as the case may be, takes its final action in a renegotiation proceeding. Final Opinions and Regional Board Opinions, as well as concurrences and dissents thereto, will be made available for public inspection and copying in the Board's public information library.

This case was instituted at a time when the Board did not publish "final opinions" in accordance with the requirements of the Freedom of Information Act. Since the Board has now designated certain documents as "final opinions" and has provided for their availability to the public (39 Fed. Reg. 13650, §1480.5), little would be gained by having this Court review the decision below.

3. Petitioner also takes issue (Pet. at 9-11) with an alternative holding of the court of appeals that, in addition to their status as final opinions, Regional Board reports are "identifiable records" which must be made available to the public under 5 U.S.C. §552(a)(3) since their disclosure is not prohibited by exemption 5 of the Act.[4]

There is nothing about this issue that justifies review by this Court. The Board does not suggest that this or any other aspect of the decision below is in conflict with any other court of appeals decision. In *Environmental Protection Agency v. Mink, supra,* this Court recognized that in applying exemption 5 "Drawing . . . a line between what may be withheld and what must be disclosed is not without difficulties." 410 U.S. at 86.

[4] 5 U.S.C. §552(b)(5).

Consequently, because the factual permutations that are likely to arise under exemption 5 are infinite, litigation over the applicability of this exemption will continue in the future as it has in the past.[5]

This Court has, however, in *Environmental Protection Agency v. Mink, supra,* already set out its understanding of the framework of that section and has suggested a procedure for the lower courts to utilize when they must determine the applicability of that exemption to a particular fact situation.[6] That procedure having been followed in this case, the court of appeals was in a position to render a well-reasoned opinion as to the applicability of exemption 5 to the facts of this case.

No conflict has arisen among the courts of appeals concerning the meaning of exemption 5, and the Board has not argued otherwise. Consequently, there is no compelling reason for this Court, at this time, to offer any further guidance to the meaning of that exemption beyond that which it provided in *Environmental Protection Agency v. Mink, supra.*

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[5] *See, e.g., Montrose Chemical Corp. of Cal. v. Train,* 491 F.2d 63 (D.C. Cir. 1974); *Soucie v. David,* 448 F.2d 1067 (D.C. Cir. 1971); *Bristol-Myers Co. v. FTC,* 424 F.2d 935 (D.C. Cir. 1970); *General Services Admin. v. Benson,* 415 F.2d 878 (9th Cir. 1969).

[6] "An agency should be given the opportunity, by means of detailed affidavits or oral testimony, to establish to the satisfaction of the District Court that the documents sought fall clearly beyond the range of material that would be available to a private party in litigation with the agency." 410 U.S. at 93.

CONCLUSION

Since the petition does not raise any of the issues set forth in Supreme Court Rule 19 as grounds for review, it is respectfully suggested that the writ of certiorari be denied.

Respectfully submitted,

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April 1974

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1316

THE RENEGOTIATION BOARD, PETITIONER

v.

GRUMMAN AIRCRAFT ENGINEERING CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY MEMORANDUM FOR PETITIONER

This case, together with *National Labor Relations Board* v. *Sears, Roebuck & Co.*, No. 73-1233, also pending on petition for a writ of certiorari, presents significant issues concerning Exemption 5 which, contrary to petitioner's contention (Br. in Opp. 2, 6), involve far more than the particular agency and the facts of this case.

Under the reasoning of the District of Columbia Circuit, "a document which a decision-maker treats as justification for a decision communicated outside the bureaucracy to regulated parties" must be made public even though it was "originally prepared for purposes of predecisional consultation" (Pet. App. A, p. 21A). This ruling is thus not limited to the special procedures of the Renegotiation Board or the particular documents involved; instead, it is a broad decision which seriously

impairs the protection of the decisional process, which *Environmental Protection Agency* v. *Mink*, 410 U.S. 73, recognized to be the primary purpose of Exemption 5.[1]

The alternative holding of the court of appeals—that the reports of regional boards are "opinions" of "agencies" also seriously limits the scope of Exemption 5. Under that ruling, virtually any agency which properly delegates some of its preliminary tasks to subordinate officials jeopardizes the ability of those who make the delegation to consult freely with those who perform the preliminary tasks (see discussion in Petition 7-9).

Finally, respondent claims that because the Renegotiation Board has recently amended its regulations to provide for the issuance of opinions in the future, "little would be gained by having this Court review the decision below" (Br. in Opp. 4-5). The Board's new regulations, however, require the preparation of formal agency opinions; they do not provide for the disclosure of pre-decisional deliberative documents of the type involved here. In any event, regardless of the particular practices of any specific agency, the decision below constitutes an authoritative interpretation of the scope of Exemption 5. That interpretation of the scope of Exemption 5. That interpretation will, if left standing, seriously impair the deliberative processes of agencies throughout the government.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

MAY 1974.

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[1] As noted in our petition, the court of appeals' judgment in *National Labor Relations Board* v. *Sears, Roebuck & Co.*, No. 73-1233, was based in part on the instant case (Pet. 6, n. 12). Thus, the court of appeals did not view its decision as a narrow one.

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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1316

THE RENEGOTIATION BOARD, PETITIONER

v.

GRUMMAN AIRCRAFT ENGINEERING CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, pp. 1A–24A) is reported at 482 F. 2d 710. The opinion of the district court (Pet. App. C, pp. 26A–41A; A. 205–219) is reported at 325 F. Supp. 1146.

JURISDICTION

The judgment of the court of appeals was entered on July 3, 1973 (Pet. App. A, p. 1A). The Board's timely petition for a rehearing *en banc* was denied on September 27, 1973 (Pet. App. B, p. 25A). On January 17, 1974, the Chief Justice extended the time for filing a petition for a writ of certiorari to Febru-

ary 25, 1974. The petition was filed on that day and was granted on May 28, 1974. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Freedom of Information Act requires public disclosure of recommendations concerning the disposition of pending cases made to the members of an agency, where the agency decision reaches the same result as the recommendations but the agency does not issue any opinions explaining its decisions.[1]

STATUTE INVOLVED

The Freedom of Information Act ("FOI Act"), 5 U.S.C. 552, is set forth in the appendix to this brief, *infra*, pp. 41–44.

STATEMENT

1. THE RENEGOTIATION BOARD

The Renegotiation Act, 50 U.S.C. App. 1211, *et seq.*, states that the "sound execution of the national defense program requires the elimination of excessive profits from contracts made with the United States, and from related subcontracts." 50 U.S.C. App. 1211. It establishes the Renegotiation Board ("the Board"), composed of five members appointed by the President, with the consent of the Senate, as an independent agency in the Executive Branch to accomplish this objective. 50 U.S.C. App. 1217(a).

[1] This statement of the question varies slightly from its formulation in the petition; there is no change of substance, however.

As its name suggests, the Board operates primarily by informal negotiation with defense contractors[2] rather than by formal hearings;[3] the Board is directed to "endeavor to make an agreement with the contractor or subcontractor with respect to the elimination of excessive profits." 50 U.S.C. App. 1215(a). These negotiations are to be completed within two years; otherwise, "all liabilities of the contractor or subcontractor for excessive profits with respect to which such proceeding was commenced shall thereupon be discharged * * *." 50 U.S.C. App. 1215(c).

Where the Board and the contractor are unable to agree upon the amount of excessive profits, the Board may determine these profits by issuing a unilateral order. 50 U.S.C. App. 1215(a). The contractor may then initiate proceedings in the Court of Claims to determine its indebtedness to the United States. Such a proceeding is "not * * * treated as a proceeding to review the determination of the Board, but * * * [is] treated as a proceeding *de novo*." 50 U.S.C. App. 1218.

2. RENEGOTIATION PROCEDURE[4]

In order to assist the Board in processing the large volume of cases it handles (A. 178), the agency, pur-

[2] See *Renegotiation Board* v. *Bannercraft Clothing Co., Inc.*, 415 U.S. 1.

[3] The Board is exempted from the requirements of the Administrative Procedure Act, except for the Public Information section thereof. 50 U.S.C. App. 1221.

[4] The renegotiation procedure set forth below was in effect at the time this case arose. Since that time, the Board has twice made substantial changes in its procedure. Such changes were made by amendments to the Board's regulations published at 37

suant to statutory authorization, 50 U.S.C. App. 1217 (d), has created two regional boards, see 32 C.F.R. 1451.32 (1972), composed entirely of civil servants. A. 178. In Class A cases, *i.e.*, those in which renegotiable profits are more than $800,000, A. 77,[5] the regional boards are authorized only to make recommendations to the Board concerning the amount, if any, of excessive profits.[6] Only Class A cases are involved here.[7] Pet. App. A, p. 3A.

Every contractor subject to the Renegotiation Act, whose receipts for the fiscal year exceed the applica-

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Fed. Reg. 20690–20693 (October 3, 1972), 37 Fed. Reg. 24108–24112 (Nov. 14, 1972), and 39 Fed. Reg. 13549–13550 (April 15, 1974). The effect of these amendments on the procedure set forth in the text is footnoted.

[5] 32 C.F.R. 1471.2(b) (1972); currently in 32 C.F.R. 1471.2 (b) (1973).

[6] 32 C.F.R. 1473.2(a), 1474.3(a), 1475.3(a) (1972); currently in 32 C.F.R. 1473.2(a), 1474.3(b), 1475.3 (1973).

[7] Prior to the 1972 amendments, in all Class B cases, *i.e.*, those in which renegotiable profits are $800,000 or less, the regional boards were delegated the authority to issue orders determining the amount, if any, of renegotiable profits, 50 U.S.C. App. 1215(a), if agreement was not reached with a contractor. 32 C.F.R. 1471.2(b) (1972). An order of the regional board determining excessive profits could be reviewed by the Board, either on its own motion or at the request of the contractor. 50 U.S.C. App. 1217(e). Since virtually all regional board orders determining excessive profits in Class B cases were reviewed by the Board, the delegation of authority to the regional boards was amended in 1972 to eliminate their right to issue such orders in Class B cases. 32 C.F.R. 1475.3 (1973).

Under both the former and current procedures, an order of the regional board in a Class B case finding that there are no excessive profits (a "clearance") or an agreement with the contractor as to the amount of excessive profits is not reviewable by the Board.

ble jurisdictional amount, is required to file a financial statement with the Board. 50 U.S.C. App. 1215 (e), (f). The statements are reviewed by the Board's staff to determine whether there is any possibility that the contractor realized excessive profits. If such possibility exists, the case is assigned to a regional board, usually on a geographical basis (A. 77).

A. PROCEEDINGS BEFORE THE REGIONAL BOARD

Cases assigned to a regional board are typically assigned to a team composed of an accountant and a renegotiator.[8] *Ibid.* This team meets with the contractor, secures relevant information, and prepares a report and recommendation to the regional board. *Ibid.* Prior to the 1972 amendments, this report was called a "Report of Renegotiation," and consisted of Part IA, prepared by the accountant, and Part II, prepared by the renegotiator.[9]

[8] A regional board member previously could serve as a renegotiator. A. 178. Under the Board's current regulations, a renegotiator cannot be a regional board member. 32 C.F.R. 1472.3(d) (1973).

[9] Under the 1972 amendments to the regulations, preparation of the Report of Renegotiation was discontinued. In its place, the accountant prepares an "Accounting Report" and the renegotiator prepares a "Renegotiation Report." 32 C.F.R. 1472.3 (e) and (i) (1973). The "Accounting Report" is furnished to the contractor in all cases in which it is prepared: the "Renegotiation Report" is furnished to the contractor in those cases in which the renegotiator recommends a finding of excessive profits. In cases in which a clearance is recommended, the renegotiator prepares a report called a "Clearance Recommendation," 32 C.F.R. 1472.3(f) (1973), or the accountant and renegotiator together prepare a single report called a "Clearance Notice Report," 32 C.F.R. 1472.3(g) (1973). In these instances none of these documents are furnished to the contractor.

A typical Part IA was described by Mr. Lawrence E. Hartwig, the former Chairman of the Renegotiation Board, as containing various financial and accounting information. A. 143–144. Mr. Hartwig's deposition explained that Part II of the Report "is the renegotiator's evaluation and recommendation to the Regional Board." "This is an intra-agency communication by the Renegotiator to his superiors, namely the Regional Board." A. 77, 194. A typical Part II was described as follows, A. 95:

> * * * [T]here is Subheading A, Sources of Information. B, Application of Statutory Factors. One under that. Character of Business. Two under that, Capital Employed. Three, extent of risk assumed. Fourth, contribution to the defense effort. Five, efficiency. Six, reasonableness of costs and profits.
>
> A under that, costs.
>
> B under that, pricing.
>
> C, profits. And then a large C, capital C, entitled "Special Matters", and then a Capital D, Conclusion and Recommendation.

The Part IA was furnished to the contractor at his request; the Part II was not so furnished. A. 145, 179–180.

Prior to the 1972 amendments, in cases in which the staff team recommended a determination of excessive profits, the regional board considered such recommendation and made a tentative decision concerning the amount, if any, of excessive profits.[10] 32 C.F.R.

[10] The tentative determination or recommendation of excessive profits was eliminated from Board procedures by the 1972 amendments.

1472.3(e) (1972). Thereafter, the contractor was afforded an opportunity to meet first with the staff team and then, if requested, with a panel composed of one or more members of the regional board. 32 C.F.R. 1472.3 (f) and (h) (1972).[11] The staff team or the panel, if one was designated, submitted to the regional board its recommendation concerning the amount of excessive profits, if any, realized by the contractor.

In Class A cases, under both current and former procedures, the regional board considers the report and the recommendation of the staff team or of the panel, if one was appointed, and makes its own recommendation as to the amount, if any, of excessive profits realized by the contractor. A. 78. If the regional board agrees with the staff or panel recommendation, the report is signed by the chairman of the regional board, A. 127, but this does not signify approval of any portion of the report other than its recommendation, A. 78. If the regional board's recommendation is different from the staff or panel recommendation, an addendum to the staff report is prepared reflecting the action of the regional board.

Prior to the 1972 amendments, in those cases in which the regional board recommended a determination that the contractor realized excessive profits, the contractor could request a "Summary of Facts and

[11] While the regional board no longer makes tentative determinations of excessive profits, the opportunity to meet with the staff and a panel prior to the regional board's determination of excessive profits has been preserved. 32 C.F.R. 1472.3 (j) and (l) (1973).

Reasons"[12] explaining the reasons for the regional board's recommendation. These summaries were available to the public. A. 213; 32 C.F.R. 1480.5(a) (1972); 32 C.F.R. 1480.5(a)(16) (1974).

B. PROCEEDINGS BEFORE THE STATUTORY BOARD

The recommendation of the regional board is then submitted to the Board.[13] A. 78. The procedure followed by the Board upon receipt of the recommendation was described by Chairman Harwig (A 78–79) as follows:

> The [regional board] report, then, with the case file comes up to headquarters for review, because the Statutory Board has reserved to itself authority to conclude those cases. * * * [I]t is first sent to the Office of Accounting, which prepares an accounting memorandum

[12] A Summary of Facts and Reasons was issued to the contractor to assist it in deciding whether to enter into an agreement on excess profits. 32 C.F.R. 1477.3 (1972). In 1972, the Board amended its regulations to provide that, at this point in the proceedings, the regional board would issue a "Memorandum of Decision" to every contractor which had not theretofore indicated its willingness to enter into an agreement. 32 C.F.R. 1477.3 (1973). In 1974, the regulations were again amended to provide that, at this point, the regional board would issue a "Proposed Opinion" to every contractor which it found to have realized excessive profits and which has not theretofore indicated its willingness to enter into an agreement. 32 C.F.R. 1477.3(a) (1974).

[13] Under the 1974 amendments the regional board furnishes the contractor with a "Regional Board Opinion" at the same time its final recommendation is submitted to the Board. 32 C.F.R. 1477.3(c) (1974). In Class B cases concluded by the regional board pursuant to its delegated authority, the regional board furnishes the contractor with a "Final Opinion." 32 C.F.R. 1477.3(b) (1974). Regional Board Opinions and Final Opinions are available to the public. 32 C.F.R. 1480.5(a) (17) and (18) (1974).

addressed to the Office of Review, in which it comments upon the accounting, the figures, and indicates whether in its opinion the Regional Board accountant, his recommendation, has been satisfactory.

Assuming that to be so, then the Office of Review will look at the recommendation of clearance and it will assign a reviewer to the case. And the reviewer will indicate then by way of recommendation to the—to the Board whether he concurs or disagrees with the Regional Board's recommendation.

And the Director of the Office of Review will also indicate whether he agrees or disagrees with the recommendation of the Regional Board.

So that when the case then comes up to the Board on its agenda, the papers have previously been circulated to the Board members for study.

All the staff's recommendations have been circulated for study by the individual Board members. Each one will conduct his own independent study. Each one has an assistant who himself may look at the case file and look at the underlying documents for the purpose of advising that Board member.

Prior to the 1972 amendments, when the regional board recommended a clearance or an agreement with the contractor and the Board agreed with that recommendation, it returned the case to the regional board for the preparation or execution of the necessary documents. 32 C.F.R. 1473.2(a) and 1474.3(a) (1972).[14]

[14] In recognition of the fact that the Board had not delegated authority to the regional boards to issue clearances in Class A cases and that, in reality, the clearances were issued by the

Under both the former and current procedures, other cases, where the Board does not agree with a recommendation of a clearance or agreement or where the contractor does not agree with an excessive profit recommendation, are generally referred to a division of the Board composed of three of the five members. 32 C.F.R. 1472.4 (1972). The division reviews the case, conducts meetings with the contractor and attempts to reach an agreement. *Ibid.* After the division completes its review, it prepares a report which is submitted, along with the other components of the file, to the Board. 32 C.F.R. 1472.4(c) (1972); A. 81.

The Board then considers and after a discussion (which is not limited to matters included in the reports, A. 181), votes on the case. As Chairman Hartwig explained (A. 79):

> * * * [W]hen the recommendation clearance of the Regional Board comes up on the Board agenda, the Board simply approves or disapproves the clearance. It does not adopt any of the memoranda that are before it. It does not ratify or adopt any of these staff memoranda. It simply, in the exercise of its judgment, says it is a clearance or it isn't a clearance. And there is no Board-adopted document which you could call an opinion.

Board (see *e.g.* A. 77–79, 93, 193), the Board subsequently amended its regulations so as to provide for the issuance of a clearance by the Board in Class A cases when it agreed with the recommendation of a regional board. 32 C.F.R. 1472.2(a) and 1472.3 (1973).

Similarly, Chairman Hartwig testified that "when the Board adopts the recommendation of the Division, it does just that. It does not adopt the Division report. It adopts the conclusion. It adopts the conclusion or the recommendation, but not the report" (A. 81; see also, A. 180–181, quoted *infra*, pp. 14–15.

The actions of the Board are recorded in minutes of the Board meetings. A. 91. Those minutes are not verbatim statements of the discussion by the Board, but are simply a record of Board action. *Ibid.* In each case, the minutes simply state that the Board either approved or disapproved the "recommendation" of the Division before it. *E.g.*, A. 55, 169. The minutes also indicate any dissenting vote by a Board member from a Board action. A. 169.

The contractor is notified of the results of the Board's deliberations and, again, when the Board determines that the contractor realized excessive profits, he may request a "Summary of Facts and Reasons," [15] a document which is prepared anew and is not simply a summary of various memoranda in the files. A. 189. These summaries are available to the public. 32 C.F.R. 1480.5(a) (1972); 32 C.F.R. 1480.5 (a)(16) (1974).

If the contractor agrees with the Board's decision, an agreement is prepared and executed. 32 C.F.R. 1474.4 (1972). If the contractor is unwilling to agree, the Board issues an order determining the amount of

[15] The Summary of Facts and Reasons and later documents issued by the Board parallel the documents issued by the regional boards. See footnote 12, *supra*.

excessive profits. 32 C.F.R. 1475.4 (1972).[16] In such a case the Renegotiation Act provides that the contractor can request a "Statement of Facts and Reasons" stating the basis for the Board's action.[17] A. 189. These statements are available to the public. 32 C.F.R. 1480.5(a)(3) (1972).

3. THIS LITIGATION

In April, 1968, the Board notified respondent, a government contractor, that the Board had determined that respondent had earned excessive profits of $7.5 million for the fiscal year which ended on December 31, 1965. A. 8.

In that same month, respondent requested certain documents from the Board in connection with this determination, including "the final opinions, determinations, unilateral orders, agreements, clearance notices and letters not to proceed" issued in Board proceedings concerning 14 other government contractors, as well as the "summaries of the facts and reasons upon which such final opinions, determinations, unilateral orders, and agreements [were based] * * *." A.9. The Board denied the request on the basis, *inter alia,* that the requested documents were exempt from

[16] Under the 1974 amendments, the Board furnishes the contractor with a "Final Opinion" at the same time as the order, agreement or clearance is issued. 32 C.F.R. 1477.3(b) (1974). Such Final Opinions are available to the public. 32 C.F.R. 1480.5(a)(17) (1974).

[17] 50 U.S.C. App. 1215(a); 32 C.F.R. 1477.2 (1972).

compelled public disclosure pursuant to Exemption 5 [18] of the Freedom of Information Act ("FOI Act").

Respondent then instituted this suit (A. 12, 16) under the FOI Act to compel the Board to disclose the documents. The district court granted the Board's motion for summary judgment. A. 51a.

The court of appeals reversed. A. 52–58. With respect to the documents relating to the 14 government contractors, the court held that Section 552(a)(2)(A)[19] of the FOI Act requires government agencies to make public their "final opinions, including concurring and dissenting opinions, as well as orders" after appropriate deletions to protect material exempt from disclosure pursuant to the Act. A. 53–55. The court, therefore, remanded the case to the district court to allow respondent access to the opinions and orders requested.

On remand, the Board disclosed a number of documents to respondents, including fifty-one "clearance" notices and two unilateral orders, issued in the cases of the fourteen contractors which had been the subject of respondent's FOI Act request. A. 206. The

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[18] Exemption 5, 5 U.S.C. 552(b)(5), protects from compelled disclosure under the Act: "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."

[19] That Section provides that:

> (2) Each agency, in accordance with published rules, shall make available for public inspection and copying—
>
> (A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

Board also filed a motion for summary judgment with respect to the remainder of the documents. A. 59–69.

Respondent filed a motion for an order in accordance with the mandate of the court of appeals. A. 70–72. In this motion, respondent contended that the court of appeals had ruled that the Board was required to disclose all "opinions relating to fourteen named corporations," but that the Board had failed to disclose, *inter alia,* recommendations prepared by a division of the Board and reports by a regional board which resulted in a clearance. A. 70–71.

In order to support its contention that such documents were "final opinions," respondent sought to depose Lawrence E. Hartwig, Chairman of the Renegotiation Board. The district court thought that "[i]t is not clear * * * what constitutes in fact a *final* order and opinion" (A. 73) and, therefore, denied the Board's motion for a protective order. *Ibid.*

In his deposition, A. 74–204, Chairman Hartwig was questioned extensively about the procedures of the Board and the contents of the various Board files which related to the fifty-one clearance notices and two unilateral orders furnished to the respondent. Mr. Hartwig explained in detail why, even though the Board may reach the same result, the Board does not adopt or ratify division reports, or regional board reports, which accompany recommendations that a clearance be issued (A. 180–181):

> As a practical matter, as I think I said earlier, the Board would never get the job done as expeditiously as Congress intended for it to be done, if a Board agreement had to be

secured with respect to every report which is submitted to it. Another reason that the Board operates this way is that this is a judgemental type of operation where Board members may disagree with each other respecting the evaluation of a particular statutory factor; but, nevertheless, can agree on the decision. Frequently, it happens in Board discussions that one Board member will emphasize one factor more than another. Or, I know of instances where, upon review of a proposed clearance, an individual Board member might criticize the report of renegotiation because it omitted something. He may even question whether the recommendation incorporated in that report is sufficiently supported in the report itself.

But when he makes an independent examination of the file he may find, for example, a performance report which convinces him that the recommended clearance is appropriate, even though the particular renegotiator may not have commented favorably on the contractor's performance. This will simply illustrate how these cases come before the Board.

There may be a case where one Board member will consider that the clearances are justified, clearance is justified, in his own mind, because the overall costs are reasonable. Another Board member might not be impressed by that point, he may consider that perhaps the overall costs are not low costs, but simply reasonable costs, but be more impressed by the contribution to the defense effort than his colleague. Nevertheless, despite the differences in evaluation, they can agree on the result.

The deposition of Chairman Hartwig was the only evidence before the district court as to Board procedures and the court found that the Board only "studies and considers" but "does not adopt" (A. 210) regional board and division reports. The court held that, where neither a statement of facts and reasons nor a summary of facts and reasons is issued, (a) the reports and recommendations of a division of the Board, and (b) the reports and recommendations of a regional board, constitute "final opinions * * * made in the adjudication of cases" within the FOI Act (5 U.S.C. 552(a)(2)(A)) (A. 213–18), which must be indexed and disclosed to the public. The district court reasoned that a division report "at the very least * * * reflect[s] the analysis of one member [of the Board] and * * * thereby constitute[s] a concurring opinion" which must be made public. A. 215. The district court concluded that regional board reports constitute "final opinions" with the meaning of the Act because:

> * * * a clearance notice by itself is meaningless. In order for the public to be fully informed, the reasons behind the clearance notice must be made available and in this type of case such facts and reasons are found in the Regional Board's report. [A. 216.]

On appeal the court of appeals "agree[d] * * * with the ruling and reasoning of the District Court requiring disclosure of reports and recommendations of divisions of the Renegotiation Board and any concurrences or dissents thereto" (Pet. App. A, p. 3A, n. 2). The court of appeals also held that the district court's judgment concerning regional board reports and rec-

ommendations could be supported on two additional grounds.

The court ruled that the regional boards were "agencies" within the meaning of 5 U.S.C. 552(a)(2)(A) and that their reports to the Board could be viewed, either, as the district court held, as final opinions of the Board, or as final opinions of the regional boards, as agencies themselves. Pet. App. A, pp. 3A–13A. The court also held that Exemption 5 of the FOI Act (5 U.S.C. 552(b)(5)), covering inter-agency or intra-agency memoranda, relied upon by the Board as exempting the regional board reports from compelled disclosure, did not apply to the documents, regardless of their status as final opinions. It stated that the purposes of Exemption 5 would not be thwarted by public disclosure of "a document which a decision-maker treats as a justification for a decision communicated outside the bureaucracy to regulated parties," even though it was "originally prepared for purposes of pre-decisional consultation * * *" (Pet. App. A, p. 21A).

SUMMARY OF ARGUMENT

Regional board reports and division recommendations are not, as the courts below held, "final opinions * * * made in the adjudication of cases," subject to the compelled disclosure requirements of the FOI Act. Rather they are "intra-agency memorandums" exempt from disclosure by Section 552(b)(5) of the Act.

I

5 U.S.C. 552(b)(5) exempts from disclosure "inter-agency or intra-agency memorandums or letters

which would not be available by law to a party other than an agency in litigation with the agency." The exemption was designed to preserve the free exchange of ideas and recommendations which is an essential element of reasoned decision-making, by protecting pre-decisional, consultative documents against compelled public disclosure. The division and regional board reports at issue here clearly come within the terms and intent of that exemption.

The division reports are pre-decisional communications between decision-makers at the highest level. They are not intended to, and do not necessarily reflect, the reasons which underlie a final Board decision. Compelled public disclosure of such communications would thus not only mislead the public but would also gravely impair the decisional processes of an agency by preventing confidential communication between members of the agency. Similarly, the regional board reports are intra-agency memoranda within the meaning of Exemption 5. The regional boards, composed entirely of civil servants, possess no decisional authority in the cases at issue here. The regional board reports simply contain recommendations, together with supporting reasons, made by subordinates to their presidentially-appointed superiors. Disclosure of the regional board reports would obviously mislead the public into the mistaken belief that they contained the reasons which led the Board to a particular decision and would impair the decisional processes of the Board.

The court of appeals erroneously held that Exemption 5 is not applicable to the division and regional

board reports because they are utilized to justify a decision subsequently announced to the public. The court's ruling is contrary to the undisputed evidence that the documents are not used to justify decisions and fails to recognize that the deliberative process is impaired if consultative documents cannot be prepared with assurance of confidentiality even after a decision is reached.

II

The courts of appeals held the division reports were "final opinions" of the Board or at the least "concurring opinions," and that the regional board reports were either "final opinions" of the Board or "final opinions" of the regional boards, considered as separate "agencies" within the meaning of the FOI Act, issued in the adjudication of cases. Accordingly, the courts held that Exemption 5 was not applicable to the documents and that they were disclosable to the public pursuant to Section 552 (a)(2)(A) of the Act.

But the division reports are not "final opinions" of the Board or even "concurring opinions." The division reports are pre-decisional consultative documents which are designed to serve as bases for discussion. They are not intended to and do not function as explanations for decisions taken after discussion.

Similarly, regional board reports cannot be viewed as "final opinions" of the Board, since the reports are merely advisory recommendations submitted by civil servant employees to their superiors. The theory of the court of appeals that these advisory recommendations must be considered as "final opinions" because the Board's review of them is only "perfunctory" is con-

trary to the undisputed evidence demonstrating extensive and independent review by the Board, and is based upon an impractical and anomalous standard which will, if adopted, chill the deliberative process and require judicial intrusion into the mental processes of the Board.

The regional board reports cannot be viewed, alternatively, as the "final opinions" of "agencies" (regional boards) possessing an identity which is separate and distinct from that of the Board. In order to fulfill its responsibilities, the Board, as any government agency, is forced to delegate some of its functions to subordinates in order to preserve the ability of the Board members to establish policy and to direct the activities of the agency. In the cases at issue here, the Board has delegated certain preliminary functions to the regional boards but has delegated no decisional authority. An interpretation of the terms "agency" and "final opinions" which subjects the recommendation of these entities to public disclosure thus severely jeopardizes the ability of superiors to delegate some functions to subordinates while retaining their ability to communicate freely with those to whom the delegation is made.

ARGUMENT

INTRODUCTION

We will argue at some length below that regional and divisional reports are "* * * intra-agency memorandums * * *" exempted by Exemption 5 (5 U.S.C. 552(b)(5)) from compelled disclosure (Point I),

rather than "final opinions," as the courts below held (Point II).[20] Preliminarily, however, we note that the court of appeals was led to characterize these documents as "final opinions" by a misconception of the FOI Act. The underlying premise of the decisions below is that, because the Board did not write formal opinions it was appropriate to treat the most proximate staff document containing recommendations followed by the Board as the Board's opinion.[21] The flaw in the premise is the assumption that all agencies must write opinions. Since the staff documents were never intended to serve as opinions, the effect of the court's approach will be to impel agencies to write formal opinions which will more accurately reflect the agencies' collective thinking and judgment.

However desirable it might be, in certain circumstances, for agencies to write opinions, it is not the office of the FOI Act to bring about such restructuring of agency procedures. When Congress has thought it

[20] We argue Exemption 5 first because the government's burden in this case would not be satisfied by demonstrating that these documents are not "final opinions": they are concededly "identifiable records" subject to disclosure under 5 U.S.C. 552(a)(3), unless they are exempt under 5 U.S.C. 552(b).

[21] Thus, the district court (whose "reasoning" the court of appeals adopted) held that a division recommendation was a final opinion because, "[i]t is in fact the last document which explains reasons for the Board's decision" (A. 215) and a regional report was a final opinion because, "[i]n order for the public to be fully informed, the reasons behind the clearance notice must be made available and in this type of case such facts and reasons are found in the Regional Board's report" (A. 216).

advisable for agencies to write opinions, it has told them directly to do so, either in the agencies' organic statutes or the Administrative Procedure Act.[22] Indeed, in those cases where Congress believed it appropriate for the Renegotiation Board to write opinions, it so provided in the Board's statute.[23]

If the FOI Act is interpreted in a way which forces agencies to write opinions, it will seriously undermine the efficiency of agencies which—because of the character and volume of their business—Congress has not required to write opinions. This point was well-stated by a different panel of the court below. In *Sterling Drug Inc.* v. *Federal Trade Commission,* 450 F. 2d 698, 707, the court spoke of "the salutary effect of requiring agencies to issue an opinion with every order," but concluded:

> Although persuasive in the abstract, this reasoning is unrealistic when applied to the everyday

[22] The Administrative Procedure Act imposes no requirement that the Renegotiation Board prepare opinions. See note 3, *supra.* Moreover, the requirement in the APA that agencies make "findings and conclusions" applies only to rule-making proceedings (5 U.S.C. 557) and only to adjudications "required by statute to be determined on the record after opportunity for an agency hearing" (5 U.S.C. 554 (a)). See *Camp* v. *Pitts,* 411 U.S. 138, 141 n. 3. The decisions of the Board at issue here do not constitute "rule-making", see 5 U.S.C. 551(5), and the Board is not required by its organic statute to render its decisions upon a record (see note 23, *infra*).

[23] 50 U.S.C. App. 1215(a) provides that when the Board issues a unilateral order determining the existence of excess profits, it shall, upon request of the contractor concerned, issue a statement of facts and reasons for its order. The Board's organic statute does not require the issuance of "opinions" in any other situation.

> world of overburdened administrative agencies. Agencies are required to issue opinions with many of their orders, but it is completely unreasonable to suppose that every agency order can be accompanied by an opinion.[24]

In our view, the decision in this case will tend to have just such an "unreasonable" effect on agency action.

We proceed to a consideration of the FOI Act and the reasoning of the court below.

I. THE DIVISION AND REGIONAL BOARD REPORTS ARE EXEMPT FROM COMPELLED DISCLOSURE BECAUSE THEY ARE INTRA-AGENCY MEMORANDA WITHIN THE MEANING OF EXEMPTION 5 OF THE FREEDOM OF INFORMATION ACT.

Exemption 5 of the FOI Act (5 U.S.C. 552(b)(5)) exempts from compelled public disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." In *Environmental Protection Agency* v. *Mink*, 410 U.S. 73, 86, this Court noted that with Exemption 5, "Congress intended to incorporate generally the recognized rule that 'confidential intra-agency advisory opinions * * * are privileged from inspection'" (quoting *Kaiser Aluminum & Chemical Corp.* v. *United States*, 157 F. Supp. 939, 946 (Ct. Cl.) (Reed, J.)). Quoting further from *Kaiser*, the Court recognized (410 U.S. at 87):

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[24] In a footnote to the quoted language the court observed (450 F.2d at 707, n. 9):

> The Social Security Administration issues more than four million orders a year, the Bureau of Customs three million orders, the Department of Agriculture two million feed grain and wheat diversion orders, and the FCC more than one million licenses (each an order).

> There is a public policy involved in this claim of privilege for this advisory opinion—the policy of open, frank discussion between subordinate and chief concerning administrative action.

The Senate Report on the bill which became the FOI Act noted the same policy (S. Rep. No. 813, 89th Cong. 1st Sess. at 9):

> * * * it would be impossible to have any frank discussion of legal or policy matters in writing if all such writings were to be subject to public scrutiny * * * [The] efficiency of Government would be greatly hampered if, with respect to legal and policy matters, all Government agencies were prematurely forced to "operate in a fish bowl."

See also H. Rep. No. 1497, 89th Cong., 1st Sess. 10 ("House Report").

The division and regional board reports at issue here come within both the terms and intent of Exemption 5. The documents are pre-decisional and consultative in nature and are designed solely to provide advice and counsel to the persons who have the responsibility for making decisions.

1. THE DIVISION REPORTS

Division reports are prepared by individual Board members who share ultimate responsibility for a Board decision and are addressed solely to the other Board members with whom this responsibility is shared. The documents are pre-decisional communications between decision-makers at the highest level. As such, there is a special need that their confidentiality be protected. As a different panel of the court below

observed (*Sterling Drug Inc.* v. *Federal Trade Commission, supra,* 450 F. 2d at 708):

> * * * Congress expressly indicated that intra-agency communications of thoughts and opinions are to be protected, and nowhere is that protection more needed than between the ultimate decision-makers within an agency. In most agencies the exchange of views between Commissioners or Board members is considered perhaps the most essential element in the decisional process. Thus, continual expression of ideas and strong advocacy of positions are to be encouraged to the fullest at this level.

The pre-decisional nature of division reports was repeatedly emphasized by Chairman Hartwig, whose testimony constituted the only evidence before the district court as to Board procedures. For example, the Chairman testified that the Board does not, indeed it cannot (A. 180), agree upon every facet of a report when it renders a decision. He explained that the questions before the Board are judgmental in nature, and that while Board members may disagree with an analysis that is contained in a report, they may agree with the recommended disposition contained in it. *Ibid.* As he stated:

> Many times a Board member will agree to a clearance, in this case for none of the reasons stated in the staff document. He may have his own reasons. His own assistants may have checked out some point that was bothering him, that he didn't even discuss with his colleagues. But the important thing is the informality of our procedure, whereby we all agree that we agree on the results. [A. 100].

Discussion at Board meetings is thus not limited to the reports before the Board (A. 181). Rather, the reports merely provide the basis for discussion, *ibid.*, and, as the district court specifically found, the Board either accepts or rejects the recommendations and not the reports before it. A. 210.[25]

The compelled disclosure of pre-decisional and consultative memoranda of individual members of an agency would seriously undermine its decisional process. Such disclosure would severely impair the independence and freedom of inquiry which are essential components of the administrative process. Administrators, like judicial officers, are faced with decisions involving issues which excite the "deepest feelings." *Bradley* v. *Fisher,* 13 Wall. 335, 348. The losing party in this type of case "feels most keenly the decision against him, and most readily accepts anything but the soundness of the decision [against him] in explanation of the * * * [decision]." *Ibid.* Compelled disclosure of pre-decisional documents will result in charges, no matter how unfounded, that the decision was based upon factors contained in pre-decisional memoranda even though, in fact, those factors did not form the basis for the decision.

"One must not expect uncommon courage even in * * * [administrators]." *Tenney* v. *Brandhove,* 341 U.S. 367, 377. The possibility that publicly disclosed

[25] The finding referred to speaks of regional reports, but the district court supported that finding by quoting Chairman Hartwig's description of Board action with respect to "the report of renegotiation, the reviewer's report, the Panel Division Report, et cetera * * *" (A. 180).

division reports will be seized upon as a basis for attacks upon their decisions can only lead Board members to be timid in making recommendations. This, in turn, can only lead to a consequent decline in the nature and range of alternatives considered prior to the rendering of a decision and a resultant decline in the quality of decision, cf. *Pierson* v. *Ray*, 386 U.S. 547; *Tenney* v. *Brandhove, supra; Bradley* v. *Fisher, supra.* As this Court recently noted:

> Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process. [*United States* v. *Nixon*, No. 73-1766, decided July 24, 1974, slip op. p. 20, (footnote omitted).]

Moreover, compelled disclosure of memoranda circulated among members of an agency would also impair the efficiency of the agency. When such disclosure is not anticipated, the author of the memorandum is responsible only for the exposition of his views in terms which can be understood and which will persuade his fellow members in his agency. Under the decision of the court of appeals, however, the author of a memorandum can no longer write solely for his fellows, but must be sensitive that he may also be explaining a subsequent decision to the public at large. He will be impelled, not simply to report his views but to assume the responsibility of justifying to the public a proposed decision of the full membership which may or may not adopt his reasoning.

Finally, the disclosure of consultative memoranda of agency members would mislead the public. As pre-decisional, consultative documents, such memoranda are not designed to provide a full explanation of the reasons for a particular agency decision to members of the public. This Court has recognized that many administrative judgments "express an intuition of experience which outruns analysis and sums up many unnamed and tangled impressions, impressions which may lie beneath consciousness without losing their worth" (*Chicago, Burlington and Quincy Ry. Co. v. Babcock*, 204 U.S. 585, 598).

The division reports at issue are prepared by one Board member and are addressed to his fellows, all of whom share common understandings and experiences born of their service together on the same agency charged with a specific goal. The reports are designed to be understood and are interpreted by those to whom they are addressed in light of shared perceptions and views as to broad questions of policy. Accordingly, division reports do not address the totality of issues before the Board.

Important, but agreed upon, principles and assumptions are not discussed and only certain factors are highlighted. As pre-decisional, consultative documents, division reports, therefore, do not reflect the ultimate reason for a decision but merely constitute the foundation upon which subsequent discussion among those responsible for a decision is based. They are simply a basis from which reasoned decision-making may begin. A. 180–181. Disclosure of the reports, therefore, may mislead the public into the erroneous belief

that a division report contains the full and complete reasons which underlie a Board decision when, in fact, the decision was taken for other reasons.

In sum, the division reports are protected "intra-agency" memoranda within the meaning of Exemption 5. The reports are only a part, albeit an integral part, of the decision-making process. They do not represent the final product of that process. By compelling disclosure of the division reports, the courts below have thus, in effect, compelled the Board to disclose the mental process by which it reaches its decisions, and, in so doing, they have failed to respect the "integrity" and "appropriate independence" of a "collaborative" instrumentality of justice. See *United States* v. *Morgan*, 313 U.S. 409, 422. This the courts may not do. See *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402; *United States* v. *Morgan*, *supra*; *Morgan* v. *United States*, 304 U.S. 1, 18. Cf. *Fayerweather* v. *Ritch*, 195 U.S. 276, 306–07; *Shaughnessy* v. *Accardi*, 349 U.S. 280, 290 (Black, J., dissenting).

2. REGIONAL BOARD REPORTS

Regional board reports[26] are also "intra-agency" memoranda which are immune from disclosure under

[26] As noted (*supra*, p. 5), at the time this litigation arose the "Report of Renegotiation" consisted of Part IA, prepared by the accountant, and Part II, prepared by the renegotiator. The entire report, if approved by the regional board, was signed and forwarded to the Board as the regional board's recommendation. And differences in the regional board's recommendation were reflected in addenda. Since Part IA was available to the contractor (*supra*, pp. 5–6), "regional board reports" is here used to refer to Part II of the Report of Renegotiation and any addenda by the regional board.

Exemption 5. The considerations which compel the conclusion that division reports come within the terms and intent of that Exemption apply with equal force to regional reports. Indeed, the special nature of the regional boards makes the conclusion that they are intra-agency memoranda even more compelling.

More than thirty years ago, the Attorney General's Committee on Administrative Procedure noted:

> Four of the characteristics of administrative agencies * * * are their size, their specialization, their responsibility for results, and their variety of duties. Each of these characteristics to a greater or less degree, in turn, contributes to, and necessitates, a highly important characteristic of administrative procedure: delegation. The large staff of an agency, the many duties which the agency is called upon to perform, the necessity of harmonizing its affirmative responsibility for results with its equally important duty of deciding correctly as between the parties in each particular case, and the practical need for the fullest possible utilization of its special skills and expertness—each of these calls for internal organization which involves an allocation of functions among the members and staff of the agency. [Attorney General's Committee on Administrative Procedure, Final Report, reprinted as Sen. Doc. No. 8 (77th Cong., 1st Sess.), pp. 20–21 (19)]

In this case, Chairman Hartwig testified that "[t]he Regional Boards are created in order to assist the Statutory Board in processing the large volume of cases which we receive" (A. 178). The number of cases is so great, and the nature of the cases so complex,

that the Board could not fulfill its responsibilities without delegating some preliminary tasks to subordinates.

Although the Board has created the regional boards and delegated some authority to them, the Board has surrendered none of its powers of decision in the Class A cases involved here. See 32 C.F.R. 1471.2(b) (1972), *supra*. For all practical purposes, in Class A cases, the civil servants who comprise the regional boards serve as staff personnel to the Board. They investigate; they conduct preliminary negotiations; they recommend; but they do not decide.

The delegation of tasks which the Board has found necessary to the effective performance of its functions would be of limited value if the Board were unable to consult freely and openly with those to whom it has made the delegation. See *Environmental Protection Agency* v. *Mink*, *supra*. Since the regional board reports represent recommendations of subordinate staff civil servants to their presidentially appointed superiors, permitting compelled public disclosure of those reports would substantially impair the value of the delegation. As the Court of Claims noted in *Kaiser Aluminum & Chemical Corp.* v. *United States*, *supra*, 157 F. Supp. at 945–946 (Reed, J.):

> Free and open comments on the advantages and disadvantages of a proposed course of governmental management would be adversely affected if the civil servant or executive assistant were compelled by publicity to bear the blame for errors or bad judgment properly chargeable to the responsible individual with power to decide and act.

Disclosure of the regional board reports at issue here would thus violate both the terms and the intent of Exemption 5. The regional board reports are merely recommendations by subordinate staff civil servants and are addressed to their superiors, presidential appointees, who possess the sole power of decision. These superiors utilize the staff reports solely as the basis for discussion. While the Board may agree with the recommendations contained therein, as the district court specifically found, A. 210, the Board does not adopt the reports.

Compelled disclosure of regional board reports would therefore force the Board to "operate in a fishbowl" and impair its decisional processes in violation of the intent of Exemption 5.

3. THE COURT OF APPEALS ERRONEOUSLY HELD THAT AN INTRA-AGENCY MEMORANDUM LOSES ITS EXEMPTION WHEN IT IS TREATED BY AN AGENCY AS A "JUSTIFICATION FOR A DECISION"

The court of appeals held that, even if regional board reports are pre-decisional and consultative in nature, they would lose their exemption under certain circumstances. The court of appeals stated the test for the application of Exemption 5 as follows (Pet. App. A, p. 21A):

> [A] document which a decision-maker treats as justification for a decision communicated outside the bureaucracy to regulated parties should not be shielded from public disclosure on the ground that it was originally prepared for purposes of pre-decisional consultation * * *.

Concluding that regional board reports "clearly reflect and are used to justify decisions of the Regional Board communicated to the contractors under scrutiny," the court held that they had lost any exempt status they might have enjoyed (*ibid.*).

The court's analysis is contrary to the undisputed evidence in the record and seriously misinterprets the purpose of Exemption 5. In the first place, the only relevant evidence in this case conclusively demonstrates that the Board does not treat either division reports or regional board reports as justifications for its decisions (*supra*, pp. 14–15). The court of appeals' assumption that the Board adopted the reasoning of the reports is contrary to the undisputed evidence. Its conclusion that disclosure of the reports after decision will not impair the decisional process is, therefore, erroneous.

Whether the pre-decisonal consultative document is disclosed before or after a decision is rendered or whether the decision ultimately accords with the recommendation contained in the advisory memoranda is not significant. The important factor is whether the author of a document can prepare the document with confidence that it will not be made public. If he can be confident that it will not be subjected to public disclosure, the document can be frank and candid. It can be imaginative and it can be tentative.

If, however, the author is aware that the document may be subjected to compelled disclosure after the decision is rendered (if the decision ultimately reached

accords with his recommendation), the ability to be open and candid in the original document is destroyed. The policy underlying Exemption 5, therefore, requires that internal deliberative documents be protected from compelled disclosure even after the final decision is rendered and even though that decision ultimately accords with the recommendation contained in the advisory memoranda.

II. THE DIVISION AND REGIONAL BOARD REPORTS ARE NOT FINAL AGENCY OPINIONS ISSUED IN THE ADJUDICATION OF CASES.

If, as we have argued, the regional board reports and division recommendations are intra-agency memoranda within the meaning of Exemption 5, they cannot be "final opinions, including concurring and dissenting opinions * * *, made in the adjudication of cases" within the contemplation of Section 552(a)(2)(A) of the FOI Act (5 U.S.C. 552(a)(2)(A)). Indeed, the court of appeals itself described the two sections as "mutually exclusive" (Pet. App. A, p. 12A). It approached the case from the other direction, however; it first held that reports are final agency opinions, and then concluded that as such they cannot be exempt inter-agency or intra-agency communications.

The Act, however, provides that it "does not apply" to matters covered by any of the exemptions. If, as we have shown, the reports are covered by Exemption 5, the disclosure and other requirements of the FOI Act are expressly inapplicable, and whether the reports are final agency opinions is irrelevant. However,

since the court of appeals approached the problem from the opposite direction, we now show that the reports are not "final [agency] opinions * * * made in the adjudication of cases" within the meaning of the FOI Act.

1. THE DIVISION REPORTS ARE NEITHER "FINAL OPINIONS" NOR "CONCURRING OPINIONS" OF THE BOARD.

The court of appeals affirmed the district court's holding that a division report is a "final opinion" of the Board or "at the very least * * * reflects the analysis of one member [of the Board] and * * * thereby constitute[s] a concurring opinion," Pet. App. A, p. 3A n. 2; A. 215, within the meaning of 5 U.S.C. 522(a)(2)(A). These rulings are erroneous.

Final and concurring opinions are written to explain the reasons for a particular decision. When read together with a majority opinion and a dissenting opinion, if any, a concurring opinion provides a full exposition of the factors considered by those who have rendered the decision and a full explication of their reasons for adopting a particular course of action.

As we demonstrated above, *supra*, pp. 24–29, division reports are pre-decisional communications between decision-makers at the highest level. Division reports, unlike final opinions, do not contain, and are not intended to contain, a full exposition of the reasons which form the basis for a Board decision. A. 180–181. Moreover, division reports, unlike concurring opinions, are not designed to be read with a majority opinion. These reports merely reflect the preliminary

views of a portion of the Board—views which may change as the result of discussion by the full Board. *Ibid.* The compelled public disclosure of these documents will thus not only impair the decisional process of the Board, *supra,* pp. 26–27, but will also mislead the public into the mistaken belief that a division report reflects the true basis for a Board decision. *Supra,* pp. 28–29.

2. REGIONAL BOARD REPORTS

The court of appeals held that the regional board reports could be viewed either as "final opinions" of the Board or as "final opinions" of the regional boards themselves, which it viewed as "agencies" which are separate and distinct from the Board. Pet. App. A, pp. 6A–12A. Neither ruling is correct.

a. The regional board reports are not final opinions of the Board.

As we have shown, *supra,* pp. 29–32, the regional board reports are not "final" opinions of the Board. Relying on the testimony of Chairman Hartwig (A. 180–181), the district court stated (A. 210):

> It is important to note that in no case does the Board formally adopt reports or recommendations of either the Regional Boards or its staff. It studies and considers but it does not adopt.

The regional board reports are staff-prepared documents addressed to superiors which are advisory in nature and serve as bases for discussion and decision. See pp. 29–32, *supra.* Moreover, as Chairman Hartwig

made clear, the reports cannot be assumed to reflect the reasons for a Board decision, simply because that decision is in accord with the recommendation contained in the report: each member may have his own (and different) reasons for agreeing with the recommendation (A. 180–181).

The court of appeals reasoned that the reports should be viewed as "final decisions" of the Board because of the "perfunctory nature" of the Board's review of regional board reports. Pet. App. A, pp. 4A–5A. The only evidence in the record, however, shows that the Board's review of the reports is anything but "perfunctory."

Chairman Hartwig testified (A. 78–79) that before the Board considers a report, the file is reviewed by both the Board's Office of Accounting and Office of Review; that the Director of the Office of Review prepares a recommendation to the Board concerning the regional board report; and that all of the recommendations are submitted to individual Board members, each of whom conducts an independent study and each of whom may direct his own assistant to conduct a study. A. 79. It is only after this extensive and exhaustive procedure that the Board begins its formal consideration of the case.

In any event, there is no reason why pre-decisional advisory memoranda should lose their confidentiality because a reviewing court concluded that the agency superior to whom the reports are submitted gives the memoranda only "perfunctory" review. The openness and candor of the staff member who prepares the recommendation would be seriously impaired if the con-

fidentiality of the recommendation were to depend upon a judicial evaluation of how comprehensive the agency review had been. Indeed that ground for decision constitutes an impermissible intrusion by the judiciary into the internal mental processes of an agency. See *United States* v. *Morgan*, and other cases cited at p. 29, *supra*.

b. The regional boards are not "agencies" under the FOI Act whose recommendations are "final opinions."

Section 552(a)(2)(A) of the FOI Act requires each "agency" to make its "final opinions" available to the public. The court of appeals held (Pet. App. A, pp. 5A–13A) that even if the regional board reports are not "final opinions" of the Board, they are the "final opinions" of the regional boards themselves, which the court viewed as "agencies" which are separate and apart from the Board itself.

But, as we have demonstrated, pp. 5–8, 29–32, *supra*, the regional boards in Class A cases are composed of civil service staff personnel to whom their superiors have delegated the function of investigation and recommendation. They have, in Class A cases, no power of decision. 32 C.F.R. 1471.2(b) (1972). The record thus refutes the court's conclusion that the recommendations of regional boards are "agencies" within the meaning of the FOI Act whose recommendations must therefore be viewed as "final opinions."

Moreover, that view would jeopardize the effective and efficient operation of statutory agencies which must delegate some of their preliminary functions to staff personnel in order to fulfill their responsibilities.

As we have noted, *supra,* p. 30, delegation is an inherent characteristic of government agencies. Without the power of delegation, agency heads would be unable to fulfill their primary functions of "direction and supervision." Attorney General's Committee on Administrative Procedure, *supra,* Sen. Doc. No. 8, at p. 21. Agencies with a large volume of matters before them could not review even a fraction of the cases which come before them each year without the ability to delegate at least some preliminary details. But the value of such delegation would be severely undercut if subordinates were inhibited from making frank and candid recommendations by a concern that their recommendations would be subject to compelled public disclosure.

Under the court of appeals decision, however, whenever, as here, presidentially-appointed superiors delegate some of their functions, but not their power of decision, to subordinates, the result may be the creation of a new "agency" within the meaning of the FOI Act. The result would seriously weaken the superiors' ability to consult with their subordinates in the manner which is required to provide sound decision-making.[27] Such a result is contrary to the

[27] See *Washington Research Project, Inc.* v. *Department of Health, Education and Welfare,* 366 F. Supp. 929, 935, appeal pending, C.A.D.C. No. 74-1027, where the district court held, on the authority of the court of appeals decision in this case, that advisory recommendations of committees composed of scientists employed as consultants by the Department of Health, Education and Welfare to review biomedical research grant applications for scientific merit were "final opinions" of "agencies" within the meaning of the FOI Act.

traditional understanding of what constitutes an "agency", finds no support in the terms or legislative history of the FOI Act, and seriously impairs the ability of agencies to make essential delegations of functions.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

The provisions of the Freedom of Information Act (5 U.S.C. 552) are as follows:

§ 552. Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying—

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; and

(C) administrative staff manuals and instructions to staff that affect a member of the public;

unless the materials are promptly published and copies offered for sale. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, or staff manual or instruction. However, in each case the justification for the deletion shall be explained fully in writing. Each agency also shall maintain and make available for public inspection and copying a current index providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the pub-

lic may be relied on, used, or cited as precedent by an agency against a party other than an agency only if—

(i) it has been indexed and either made available or published as provided by this paragraph; or

(ii) the party has actual and timely notice of the terms thereof.

(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, on request for identifiable records made in accordance with published rules stating the time, place, fees to the extent authorized by statute, and procedure to be followed, shall make the records promptly available to any person. On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo and the burden is on the agency to sustain its action. In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member. Except as to causes the court considers of greater importance, proceedings before the district court, as authorized by this paragraph, take precedence on the docket over all other causes and shall be assigned for hearing and trial at the earliest practicable date and expedited in every way.

(4) Each agency having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding.

(b) This section does not apply to matters that are—

(1) specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

(c) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress.

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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1316

THE RENEGOTIATION BOARD,

Petitioner,

v.

GRUMMAN AIRCRAFT ENGINEERING CORPORATION,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT

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BRIEF FOR THE RESPONDENT

STATEMENT

The renegotiation process has been described in detail in the brief of the Renegotiation Board (hereinafter referred to as the "Board"). As noted, the Board has substantially changed both its operating procedures and its policy on disclosure since this suit was instituted (Brief for Pet. at 3-4, n.4), but those changes

were prospective in nature and have had no effect on the public availability of the specific documents now in issue before this Court.

At the time this suit was brought in 1968, the Board did not make public its final opinions in any form despite the fact that it had promulgated new regulations pursuant to the requirements of the Freedom of Information Act (hereinafter cited as "FOIA"), 5 U.S.C. § 552, which specifically provided for the availability of "final opinions." 32 C.F.R. § 1480.5 (1968). It was only as a result of the first opinion of the court of appeals in this case that the Board was forced to recognize that, although not designated as an opinion, a "Statement of Facts and Reasons" issued pursuant to § 1215(a) of the Renegotiation Act of 1951, 50 U.S.C. App. § § 1211, *et seq.* (1970), and in accordance with the Board's regulations, 32 C.F.R. § 1477.2 (1968), constituted a final opinion which must be made available to the public under the FOIA, with appropriate deletion of identifying details (A.52-55).

Furthermore, contrary to the Board's brief (Brief for Pet. at 7-8), a "Summary of Facts and Reasons" was not made publicly available in 1968 when this suit was instituted. It was not until after this case was decided on remand by the district court that the Board amended its regulations to permit public inspection and copying of these Summaries.[1]

As noted in the Board's brief (Brief for Pet. at 13), as a result of the first appeal of this case, the court of appeals remanded the case to the district court to allow Grumman Aircraft Engineering Corporation (hereinafter

[1] 39 Fed. Reg. 13650 (1974).

referred to as "Grumman") access to final opinions and orders of the Board. However, on remand, the Board provided Grumman only with fifty-one clearance notices and two unilateral orders and thereupon filed a motion for summary judgment. The two unilateral orders contained determinations of excessive profits in the amounts of $8 million and $9 million, respectively, yet neither was accompanied by a final opinion.[2] Similarly, no final opinions were turned over by the Board in connection with the fifty-one clearance notices that were disclosed.[3]

Grumman thereupon filed a motion for an order in accordance with the mandate of the court of appeals (A. 70-72), describing with as much particularity as possible those documents which might be deemed to be the Board's final opinions in these cases. In order to establish which documents were in fact such final opinions, Grumman deposed Lawrence E. Hartwig, then the Board's Chairman. On deposition the Chairman described the contents of several representative case files developed during the renegotiation process.

Based upon the evidence presented, the district court held that "a final opinion is that document which states conclusions and reasons upon which the Board has acted as well as any dissents and concurrences thereto"

[2] The Board did subsequently provide Grumman with a Summary of Facts and Reasons relating to one of these orders but only because the contractor had made the document public.

[3] Under its new regulations, 32 C.F.R. § 1477.3 (1974), the Board now issues an opinion in every adjudicated case. This is commendable and vitiates the suggestion made in the Board's brief that the issuance of such opinions would "seriously undermine the efficiency" of the Board. Brief for Pet. at 22-23.

(Pet. App. C, p. 40A). The court further held that, depending on the circumstances of the case, that document may be (1) a Summary of Facts and Reasons, (2) a report and recommendation of a Division of the Board[4], (3) a report of a Regional Board, or (4), as the court of appeals had previously held, a Statement of Facts and Reasons.

On appeal, the Board contested only categories (2) and (3). The court of appeals affirmed the findings and conclusions of the district court and also held that disclosure of Regional Board reports was supportable on two additional grounds, assuming, *arguendo*, that such reports are not final opinions of the Board (Pet. App. A, p. 3A). First, after holding that the Regional Boards are themselves "agencies" within the meaning of the Administrative Procedure Act, 5 U.S.C. § 551(1), the court ruled that reports of the Regional Boards are final opinions of those agencies which must be disclosed to the public pursuant to 5 U.S.C. § 552(a)(2)(A). Secondly, the court said that Regional Board reports must be disclosed as "identifiable records" under 5 U.S.C. § 552(a)(3) since they are not exempt from disclosure under Exemption 5, 5 U.S.C. § 552(b)(5).

SUMMARY OF ARGUMENT

The FOIA requires that agencies make available for public inspection and copying their final opinions, including concurring and dissenting opinions, made in the adjudication of cases. 5 U.S.C. § 552(a)(2)(A).

[4] A Division consists of three of the five members of the Board (A. 80).

I.

The district court found and the court of appeals affirmed that Board documents which are designated as (1) Division reports and recommendations and (2) Regional Board reports constitute final opinions of the agency, depending on the circumstances of the case. If no Statement of Facts and Reasons or Summary of Facts and Reasons accompanies the agency's determination, the Division report and recommendation prepared by members of the Board is the final expression of the Board's reasons for the actions it takes in adjudicated cases. Similarly, in cases where the Regional Board issues a clearance notice to a contractor indicating that it has not realized excessive profits, the Regional Board report represents the final expression of the agency's reasons for the clearance determination.

The court of appeals alternatively held that Regional Boards are themselves agencies whose reports must be made public as final agency opinions. This holding is warranted under the Administrative Procedure Act and properly reflects the independent nature of the Regional Boards.

Division reports and recommendations and Regional Board reports are decisional documents which contain the Board's interpretations of its organic law. The withholding of these documents from the public would perpetuate the system of secret law that has developed within the Board.

II.

Exemption 5 of the FOIA, 5 U.S.C. § 552(b)(5), prohibits disclosure of "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with an agency." Division reports and recommendations and Regional Board reports contain a factual analysis of a contractor's performance under the statutory factors which the Board is required to apply. As such, they must be made available under the guidelines set forth in *Environmental Protection Agency v. Mink*, 410 U.S. 73 (1973). These documents are not pre-decisional, consultative memoranda whose disclosure would inhibit future frank discussions among agency members. Rather, they are documents which are the product of the decision-making process and thus fall outside the scope of Exemption 5.

ARGUMENT

INTRODUCTION

The Board has taken the position that an appropriate judicial analysis of an FOIA request commences with an inquiry into the applicability of the Act's exemptions (Brief for Pet. at 20-21). The clearest expression of this approach to the Act is the Board's statement that, "If, as we have shown, the reports are covered by Exemption 5, the disclosure and other requirements of the FOI Act are expressly inapplicable, and whether the

reports are final agency opinions is irrelevant." Brief for Pet. at 34.[5]

This construction is completely contrary to the spirit of the FOIA and the intent of its framers which emphasized that the Act "is not a withholding statute but a disclosure statute . . ." S. Rep. No. 813, 89th Cong. 1st Sess. 5 (1965) (hereinafter cited as the "Senate Report"). In the foreword to his manual designed to assist agencies in implementing the FOIA, the Attorney General confirmed that the law was initiated by Congress and signed by the President with the concern "that disclosure be the general rule, not the exception . . ." *Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act* iii (1967) (hereinafter cited as *Attorney General's Memorandum*).

We submit, therefore, that in order to prevent this new law from becoming a withholding statute as its predecessor had become (Senate Report at 3), a proper construction of the FOIA must commence with an inquiry into its affirmative disclosure provisions[6], with

[5] It should be noted that this constitutes a significant change from the Board's position in the court of appeals where in its brief it argued that, "The principal issue before the Court on this appeal involves the question as to what constitutes an 'opinion' of the Renegotiation Board within the meaning of the Freedom of Information Act, 5 U.S.C. 552(a)(2)(A)." Brief for Appellant at 21.

[6] The affirmative disclosure provisions of the FOIA are all enforceable under 5 U.S.C. § 552(a)(3). *American Mail Line, Ltd. v. Gulick*, 411 F.2d 696, 701 (D.C. Cir. 1969); *Irons v. Schuyler*, 465 F.2d 608, 614 (D.C. Cir.), *cert. denied*, 409 U.S. 1076 (1972); K. Davis, *Administrative Law Treatise* 133-134 (Supp. 1970) (hereinafter cited as "Davis").

the exemptions operating only as possible exceptions to full disclosure.[7] This was clearly the intent of Congress:

> Subsection [(a)(2) of the FOIA] (as subsec. (b) of sec. 3 of the Administrative Procedure Act) deals with agency opinions, orders, and rules. This Administrative Procedure Act subsection is replaced by a detailed subsection, specifying what orders, opinions, and rules must be made available. The exceptions have again been moved to a single subsection, subsection [b], dealing with exceptions.

Senate Report at 6. *See also* H.R. Rep. No. 1497, 89th Cong. 2nd Sess. 7 (1966) (hereinafter cited as the "House Report").

A determination as to whether an exemption applies should thus be approached through a process where the policies underlying a specific disclosure provision are weighed against the policies underlying the exemption in issue. This was the approach employed by the court of appeals (Pet. App. A, pp. 12A-13A). It first concluded that Regional Board reports are final opinions of an agency subject to disclosure under 5 U.S.C. § 552(a)(2)(A). Thereupon it found, as a matter of definition, that such opinions, which are decisional documents, could not also be pre-decisional inter- or intra-agency memoranda exempt under 5 U.S.C. § 552(b)(5).

Accordingly, our brief first argues that the documents involved are final opinions which Congress mandated be made available to the public. We then

[7] It has been suggested that, in the public interest, agencies should consider disclosure even if an exemption applies. *Attorney General's Memorandum* at 2-3.

show that such opinions do not come within either the language or the policies underlying Exemption 5.

I.

DIVISION REPORTS AND RECOMMENDATIONS AND REGIONAL BOARD REPORTS ARE FINAL OPINIONS, INCLUDING CONCURRING AND DISSENTING OPINIONS, MADE IN THE ADJUDICATION OF CASES, WHICH MUST BE MADE AVAILABLE UNDER THE FREEDOM OF INFORMATION ACT.

A. Background

Under 5 U.S.C. § 552(a)(2)(A) each agency is required to make available for public inspection and copying final opinions, including concurring and dissenting opinions, made in the adjudication of cases. It is clear that the complexity of the administrative structure led Congress to order that these opinions be made available:

> As the Federal Government has extended its activities to solve the Nation's expanding problems—and particularly in the 20 years since the Administrative Procedure Act was established—the bureaucracy has developed its own form of case law. This law is embodied in thousands of orders, opinions, statements, and instructions issued by hundreds of agencies. This is the material which would be made available under subsection [(a)(2) of the FOIA].

House Report at 7. It is noteworthy that Congress singled

out the Board as an agency whose practices the FOIA was intended to correct:

> As the result of a Government Information Subcommittee investigation a number of years ago, two major regulatory agencies agreed to make public the dissenting opinions of their members, but a recent survey indicated that five agencies—including the Federal Deposit Insurance Corporation and the Renegotiation Board—do not make public the minority views of their members.

House Report at 8.[8]

The public's right to access to the opinions of the Board is particularly important because of the nature of the renegotiation process. The Board was recently described by this Court in *Renegotiation Board v. Bannercraft Clothing Co., Inc., Id.*, as having "unique operational methods." Chairman Hartwig himself described the procedure whereby determinations of excessive profits are made as informal (A. 100) and the Board's operation as "judgmental" (A. 180). Although Congress did not require the Board to determine excessive profits in accordance with any specific formula (A. 196), the Board is required to evaluate individual contractors under certain statutory factors set forth in the Renegotiation Act, 50 U.S.C. App. § 1213(e). It is this evaluation that gives meaning and substance to the Act as well as to the Board's regulations.

For instance, one section of the Board's Regulations, 32 C.F.R. § 1460.2(c)(1968), which amplify the statutory considerations, provides that:

[8] This portion of the legislative history was cited by this Court in *Renegotiation Board v. Bannercraft Clothing Co., Inc.*, 415 U.S. 1, 16 (1974), to support the conclusion that the Board is subject to the FOIA. It is even more in point, however, to the issue presently before the Court.

> In evaluating the contractor's performance, comparisons will be made with the prices, costs and profits of other contractors engaged in the production of the same or similar products or using the same or similar processes.

Public disclosure of the final opinions of the Board will permit anyone with an interest in the agency's proceedings to obtain from those opinions the factual information used by the Board to compare one contractor with another. It is clear from the Board's regulations that such comparative factual information constitutes one of the principal criteria used in determining the reasonableness of costs and profits, the efficiency of the contractor and the weight to be accorded the contractor in the other statutory factors enumerated in the Renegotiation Act.

Those factors establish only a vague framework within whch the agency operates. *See Renegotiation Board v. Bannercraft Clothing Co., Inc.*, *Id.* at 28 (dissenting opinion). The Board, however, has developed certain governing principles under the statutory factors. As Chairman Hartwig testified, "Our people develop expertise through the years, and just know that in a certain industry or sub-industry, if a person has one-half of one percent profit on sales, that there is not excessive profit" (A. 88). By failing to publish the vast majority of its earlier opinions, in both excessive profits and clearance cases, the Board has continued to deny the public access to the reasons for its actions and thereby has perpetuated

a system of secret "expertise" which determines the outcome of many renegotiation cases.[9]

The essence of this case, therefore, is to shed some light on the "judgmental" standards which the Board uses to measure excessive profits by causing the Board to make known to the public how it has applied those standards in particular cases. Only by such knowledge will the public understand the meaning of those standards and have a basis for evaluating the Board's performance under its statutory mandate.[10]

B. Division Reports and Recommendations

To understand fully why a Division report and recommendation comes within the ambit of "final opinions," it is helpful to focus on precisely how such a document is formulated and what role it occupies in Board proceedings.

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[9] In *Renegotiation Board v. Bannercraft Clothing Co., Inc., Id.* at 32-33, the dissenting opinion pointed out that, if the FOIA is to have any real meaning in the activities of the Renegotiation Board, that agency has no right to make secret the basis for its decisions. There appears to be nothing in the majority opinion that is inconsistent with this view.

[10] In *Renegotiation Board v. Bannercraft, Id.* at 16, this Court cited with approval the Second Circuit's description of the "ultimate purpose" of the FOIA as one "to enable the public to have sufficient information in order to be able, through the electoral process, to make intelligent, informed choices with respect to the nature, scope and procedure of federal governmental activities."

As described in the Board's brief (Brief for Pet. at 10), in a Class A renegotiation case[11] if the Board does not concur with a clearance determination by the Regional Board or if the contractor does not agree with a determination of excessive profits by the Regional Board, the case goes before a Division of the Board, consisting of three of the five Board members. In the representative case described by Chairman Hartwig on deposition, the contractor met with the Division, and thereafter one member of the Division wrote a report and recommendation which became the Division's majority report, and the third member of the Division wrote a dissenting report. The Division Chairman then presented the Division report and recommendation and the dissenting memorandum to the other two Board members. The Board approved the Division recommendation and determined that the contractor realized excessive profits (A. 165, 168-169). One member of the Board dissented. Finally, according to the Chairman's testimony, the Board issued a unilateral order unaccompanied by any opinion (A. 169).

There can be no doubt that the Division report constituted the last written expression of the reasons for the Board's determination in the case, for there was no evidence to indicate any modification of these views. We submit that the Division report reflects the "final opinion" of a majority of the members of the Board; at a minimum, the report and the dissenting memorandum represent the Board's concurring and dissenting opinions

[11]Class A cases are those where the contractor reports renegotiable profits of more than $800,000. 32 C.F.R. § 1471.2(b) (1968). The documents Grumman sought all involve Class A cases.

which must be made available under 5 U.S.C. § 552(a)(2)(A). *See* Senate Report at 7.

The district court found that such a Division report is "the crucial and final document" which "contains a consideration of the statutory factors, explains the reasons for the division's recommendation, and gives the facts on which that reasoning rests" (Pet. App. C, p. 37A). The district court concluded that this was the "essence of a final opinion." As the court stated (Pet. App. C, pp. 37A-38A):

> It is unrealistic to claim that because Board members might have different reasons for approval of the division's recommendation, the report of the division upon which its recommendation is based is not a final opinion. It is in fact the last document which explains reasons for the Board's decision. The report often reflects the views of a majority of the five Board members. But at the very least it reflects the analysis of one member and would thereby constitute a concurring opinion which under the Freedom of Information Act is included within the term final opinion. If Board members have differing rationale for approval of the division's recommendation, they may state it in concurring opinions or memoranda (footnote omitted).

This holding, which was affirmed by the court of appeals, is entirely correct.

C. Regional Board Reports

1. Regional Boards are "agencies" within the meaning of the Administrative Procedure Act.

In its opinion, the court of appeals has clearly set forth its reasons for holding that the Regional Boards are "agencies" within the meaning of the Administrative Procedure Act. In summary, that court pointed out that the Regional Boards enjoy substantial independent authority, which, at least in some cases, is not even reviewable; that the exercise of formal decision-making power by the Regional Boards was contemplated by Congress when it promulgated the Renegotiation Act of 1951; and that the Board's own regulations invest the Regional Boards with power normally exercised only by independent decision-making agencies.[11a] These reasons fully support the ruling below, and we refer the Court to the opinion of the court of appeals for the complete development of this point and the relevant citations (Pet. App. A, pp. 6A-12A).

One matter discussed in the opinion of the court of appeals which deserves elaboration is the court's reference (Pet. App. A, pp. 10A-11A) to the section of the Renegotiation Act of 1951, 50 U.S.C. App. §1217(d), which provides in pertinent part that, "The Board may delegate in whole or in part any function, power, or duty . . . to any agency of the Government, including any such agency established by the Board . . . ." Such delegation was in fact accomplished in 1952 when, by notice in the *Federal Register*, 17 Fed. Reg. 1401 (1952), the Board established the

[11a] *See also Washington Research Project, Inc. v. Department of Health, Education and Welfare*, pp. 11-17, No. 74-1027 (D.C. Cir. September 12, 1974), wherein the decision below is discussed.

Regional Boards and delegated to them certain "functions, powers and duties."[12]

The fact that the Board in this delegation has retained review authority in Class A but not in Class B cases does not alter the conclusion that the Regional Boards are agencies. The Administrative Procedure Act, 5 U.S.C. §551(1), defines an "agency" as each authority of the United States Government "whether or not it is within or subject to review by another agency . . . ."

2. Regional Board reports are "final opinions" under the Freedom of Information Act.

a. Regional Board reports are final opinions of the Regional Boards.

When a case has been assigned to a Regional Board, a renegotiator, who in some cases is a Regional Board member (A.178), and an accountant are selected to investigate the case (A.77). After extensive consideration, including various conferences, a possible inspection of the contractor's plant and a meeting between a panel of the Regional Board and the contractor, the Regional Board reaches a final conclusion. 32 C.F.R. §1472.3 (1968). In a Class A case, whether the Regional Board concludes that the contractor realized excessive profits or not, the Regional Board notifies the Board of the Regional Board's determination and submits a "report of the case" to the Board. 32 C.F.R. §§1473.2(a) and 1475.3(a) (1968). The contractor is also notified of the

[12]The notice is reprinted in full as the Appendix to this brief.

action taken by the Regional Board. 32 C.F.R. §1473.2(a) (1968).[13] It is this "report of the case" that Grumman contends is a final agency opinion issued in the adjudication of cases which must be made available pursuant to 5 U.S.C. §552(a)(2)(A).

During the course of his deposition, Chairman Hartwig described several such reports (A.95, A.110, A.137, A.145 and A.162). In each instance, the report contained an analysis under the statutory factors which the Board is required to apply pursuant to 50 U.S.C. App. §1213(e), including efficiency of the contractor, reasonableness of costs and profits, net worth, extent of risk assumed, contribution to the defense effort and character of business.[14] In detailed testimony concerning one representative file, it was revealed that the report had been signed by the Regional Board member who prepared it and also signed by the Chairman of the Regional Board on behalf of the Regional Board (A.118-119).[15]

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[13]Since the basis for the Regional Board's determination is contained in its "report of the case", that document should be made available under the rationale of *American Mail Line, Ltd. v. Gulick, supra.*

[14]These are the same captions as are contained in a Summary of Facts and Reasons (A.149) and a Statement of Facts and Reasons (A.35-41) which the Board now makes publicly available. 32 C.F.R. §§1480.5(a)(3) and (16) (1974). *See also* 32 C.F.R. §1477.4 (1968).

[15]According to the Board, "If the regional board's recommendation is different from the staff or panel recommendation, an addendum to the staff report is prepared reflecting the action of the regional board" (Brief for Pet. at 7). In the absence of such an addendum, the report must be viewed as reflecting the views of the Regional Board.

Pursuant to the previously mentioned Delegation of Authority (see Appendix), the Regional Boards were delegated the power to determine excessive profits and, in Class A cases, to issue clearances and enter into refund agreements embodying determinations of excessive profits, if the Board has indicated it is "in accord" with such determination. As noted by the district court (Pet. App. C, pp. 38A-39A), if the Board is in accord, the notice of clearance is signed and issued by the Chairman of the Regional Board and states, in part:

> This determination has been made by this Regional Board pursuant to due delegation of authority and The Renegotiation Board has advised the Regional Board that it is in accord with this determination.

32 C.F.R. § 1498.6(a) (1968). The Notice further states that it:

> shall constitute the *final* action by the Government with respect to renegotiation pursuant to the Act for the fiscal year under review (emphasis supplied).

Based on the foregoing, the district court properly concluded (Pet. App. C, p. 39A):

> Such a report gives the facts and reasons for the Regional Board's recommendation and it is that recommendation which is approved by the Board. Here again a clearance notice by itself is meaningless. In order for the public to be fully informed, the reasons behind the clearance notice must be made available and in this type of case such facts and reasons are found in the Regional Board's report.

b. Regional Board reports are final opinions of the Board.

The district court found (Pet. App. C, p. 39A) and the court of appeals agreed (Pet. App. A, p. 3A) that, for purposes of the FOIA, Regional Board reports are final opinions of the Board itself when a clearance is issued by the Regional Board after the Board has indicated it is "in accord."[16] As the court of appeals noted (Pet. App. A, pp. 4A-5A, n.7), the Board has procedures available for reassigning a case to itself for in-depth consideration if it is not satisfied with the determination of the Regional Board (A.82). Where such a reassignment does not occur, the Regional Board report constitutes what Chairman Hartwig referred to in a different context as the "final exposition of the Board's view of the case" (A.67), thus making it the Board's final opinion.

II.

THE BOARD'S FINAL OPINIONS ARE NOT EXEMPT FROM DISCLOSURE UNDER EXEMPTION 5 OF THE FREEDOM OF INFORMATION ACT

A. Background

As has been discussed, *supra*, pp. 6-9, after an affirmative obligation to disclose under the FOIA has

[16]The question of whether Regional Board reports are final opinions of the Board need only be reached if the Court does not agree with the holding that Regional Boards are agencies which issue their own final opinions.

been demonstrated, disclosure must be made unless one of the FOIA's exemptions is held to apply to the category of documents in issue. In this case, the Board has argued that the exemption contained in 5 U.S.C. §552(b)(5) prohibits disclosure because (1) the documents are pre-decisional (Brief for Pet. at 24-27, 30-32), (2) disclosure would impair the efficiency of the Board (Brief for Pet. at 27) and (3) disclosure would mislead the public (Brief for Pet. at 28-29). These arguments must be tested against the policies supporting disclosure of final agency opinions, the purposes for the exemption and the realities of the renegotiation process.[17]

Exemption 5 deals with "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. §552(b)(5). Quoting from *Kaiser Aluminum & Chemical Corp. v. United States*, 157 F. Supp. 939, 946 (Ct. Cl. 1958) (Reed, J.), this Court, in *Environmental Protection Agency v. Mink*, 410 U.S. 73, 86 (1973), pointed out that "the legislative history of Exemption 5 demonstrates that Congress intended to incorporate generally the recognized rule that 'confidential intra-agency advisory opinions . . . are privileged from inspection.'" This Court went on to say (410 U.S. at 87):

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[17]Since Congress singled out final opinions as one of the categories of information specifically required to be made available under the FOIA, the policy considerations favoring disclosure, which must be weighed against the policies underlying Exemption 5, are more compelling than they would be if the documents fell into the catch-all section of the FOIA providing for the disclosure of "identifiable records," which the Board willingly concedes these records do. Brief for Pet. at 21, n.20. *See generally Attorney General's Memorandum* at pp. 29-30.

> But the privilege that has been held to attach to intragovernment memoranda clearly has finite limits, even in civil litigation. In each case, the question was whether production of the contested document would be "injurious to the consultative functions of government that the privilege of non-disclosure protects." *Kaiser Aluminum & Chemical Corp., supra*, at 49, 157 F. Supp. at 946. Thus, in the absence of a claim that disclosure would jeopardize state secrets, see *United States v. Reynolds*, 345 U.S. 1 (1953), memoranda consisting only of compiled factual material or purely factual material contained in deliberative memoranda and severable from its context would generally be available for discovery by private parties in litigation with the Government (footnote omitted).

The Division reports and recommendations and Regional Board reports sought here are not advisory, nor are they consultative in nature. Rather, they reflect "the end product of Federal administration,"[18] which in this case is the determination of the existence or nonexistence of excessive profits. In making this determination, the Board is required to measure a contractor's performance against generally stated but specific criteria enumerated in 50 U.S.C. App. §1213(e). In practice, this means that, after a case has been assigned to a Regional Board, the renegotiator prepares a report which, according to Chairman Hartwig's deposition, has the following format (A.110):[19]

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[18]House Report at 7.

[19]*See also* the descriptions of Regional Board reports at A.95, A.137, A.145 and A.162, of Division Reports at A.149 and A.165-166 and of a Summary of Facts and Reasons at A.149.

1. Application of Statutory Factors
   A. Character of Business
   B. Reasonableness of Costs and Profits
   C. Extent of Risk Assumed
   D. Capital Employed
   E. Contribution to Defense Effort
   F. Efficiency
   G. Special Matters[20]
2. Determination and Proposed ED Settlement

Focusing first on the section captioned "Determination and Proposed ED Settlement," it simply contained, in the case file about which Chairman Hartwig was testifying, the statement that "It is proposed that the regional board recommend to the Renegotiation Board that a clearance notice be issued" (A.111). This recommendation was thereupon approved by the Regional Board and signed on behalf of the Regional Board by its Chairman (A.119). The contractor was then notified that the Regional Board had recommended to the Board that a clearance be granted (A.112). After the Board unanimously approved the recommendation of clearance (A.121), a Notice of Clearance After Assignment was issued to the contractor (A.120).[21]

[20]The testimony indicates that Special Matters could include such items as claims by the contractor which are in litigation, claims against the contractor which are in litigation, general accounting reports which have been made public, questions relating to exemptions from renegotiation, references to Congressional investigating Committee reports involving the contractor or Internal Revenue adjustments that are still open (A.110-111).

[21]The forms of notice furnished by the Regional Board to the contractor explicitly state that the "determination" has been made by the Regional Board. 32 C.F.R. §§1498.6(a) and 1498.7 (1968).

The Board claims that the report of the Regional Board contained "recommendations of subordinate staff civil servants to their presidentially appointed superiors" (Brief for Pet. at 31). However, the only recommendation contained in the report is that the Regional Board recommends a clearance to the Board. Since this recommendation was openly communicated to the contractor, it cannot serve as the basis on which the Board invokes Exemption 5.

The remainder of the Regional Board report consists of a section entitled "Application of Statutory Factors." Because of the nature of this case, Grumman has never had access to the documents in issue; nor were they available for *in camera* inspection by the district court.[22] Nonetheless, there is in the record a document which contains the Board's evaluation of a contractor's performance under the statutory factors. That document, the Statement of Facts and Reasons issued to Grumman for its fiscal year 1965 (A.35-41), demonstrates that an analysis under the statutory factors is factual in nature with the exception of a one sentence conclusion concerning the weight the contractor is to be accorded under each such factor.

Neither the application of facts to enumerated statutory factors nor the conclusions derived therefrom would appear to constitute the type of "advice from staff assistants," "exchange of ideas among agency personnel" or "frank discussion of legal or policy

[22] *See* the discussion between counsel appearing at A.105-106 and A.115-118.

matters" which Congress sought to protect by Exemption 5. House Report at 10; Senate Report at 9. Rather, this is factual material which this Court has recognized should not be shielded by Exemption 5:

> It appears to us that Exemption 5 contemplates that the public's access to internal memoranda will be governed by the same flexible, common sense approach that has long governed private parties' discovery of such documents involved in litigation with government agencies. And, as noted, that approach extended and continues to extend to the discovery of purely factual material appearing in those documents in a form that is severable without compromising the private remainder of the documents.

Environmental Protection Agency v. Mink, *Id.* at 91. *See also Soucie v. David*, 448 F.2d 1067, 1077-78 (D.C. Cir. 1971). This approach is consistent with Congress' intent "to delimit the exception [Exemption 5] as narrowly as consistent with efficient Government operation." Senate Report at 9. To deny disclosure here would "authorize an agency to throw a protective blanket over all information by casting it in the form of an internal memorandum." *Bristol-Myers Company v. FTC*, 424 F.2d 935, 939 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970).

Facts and reasons forming the basis for an agency's decision should be revealed if the FOIA is to have any force in enabling the public to deal effectively with government agencies. As has been stated:

> [P]rivate transmittals of binding agency opinions and interpretations should not be encouraged. These are not the ideas and theories which go into

> the making of the law, they are the law itself, and as such should be made available to the public. Thus to prevent the development of secret law within the Commission, we must require it to disclose orders and interpretations which it actually applies in cases before it.

Sterling Drug, Inc. v. FTC, 450 F.2d 698, 708 (D.C. Cir. 1971).

By revealing the outcome of the cases it adjudicates without providing the public with the facts which it considers pertinent to the various statutory factors, the Board is developing a secret body of case law. Professor Davis pointed out in his analysis of the FOIA that:

> The *Attorney General's Memorandum* does not seem to take account of such possible facts as that the "opinions and interpretations" may constitute the working law of the agency, that the agency's employees may be instructed to apply such law in all individual cases, that the agency may be systematically withholding such law from affected parties, and that therefore the effect of non-disclosure may be to protect an outrageous system of secret law. Nor does the *Attorney General's Memorandum* refer at this point to the clear congressional intent that "interpretations" and "administrative staff manuals and instructions" must be disclosed, as subsection [(a) (2)] specifically requires. The problem, unrecognized by the *Memorandum*, is the accommodation of the purpose behind the requirements of subsection [(a) (2)] to the purpose behind the fifth exemption. I think such an accommodation calls for disclosure of all "opinions and interpretations" which embody the agency's effective law and policy, and the withholding of all papers which reflect the agency's group thinking in the process

> of working out its policy and determining what its law shall be. The need for secret communication among officials within the government should be recognized, but so should the need for prohibiting all secret law.

Davis at 159. In the case of the Board, a balancing of the factors favoring disclosure against the policies underlying Exemption 5 clearly militates in favor of disclosure of the Board's opinions.

B. Division Reports Are Not Exempt from Disclosure

In its brief, the Board has characterized Division reports both as pre-decisional communications and as "a part, albeit an integral part, of the decision-making process" (Brief for Pet. at 24, 29). It is this duality which caused the court of appeals to comment on "the difficulty of line-drawing between documents that reflect only pre-decisional deliberation and those which reflect decisions communicated to the public" (Pet. App. A, p. 21A). The fact remains that Division reports are prepared by members of the Board as a part of the decision-making process and thus reflect the views of the author in his or her decision-making capacity.[23] As

[23]This is to be contrasted with the situation in *Sterling Drug, Inc. v. FTC, supra*, where the memoranda of individual Commissioners comparing two mergers "were not likely to reflect fully the reasons either of the decision-makers voted to allow the previous merger." Pet. App. A, p. 19A, n.29.

such, the documents should not be viewed as intra-agency communications which Exemption 5 would protect from disclosure.

The Board has also argued that under the decision of the court of appeals a member of the Board responsible for preparing a Division report "can no longer write solely for his fellows, but must be sensitive that he may also be explaining a subsequent decision to the public at large" (Brief for Pet. at 27). As the court of appeals pointed out, however, "If agency custom were the touchstone for applicability of the exemption, the pro-disclosure policy of the Act would be easily evaded" (Pet. App. A, p. 14A).

Agency members who are charged with enforcing the law should be prepared not only to make decisions for which they may be criticized, but also to explain those decisions to the public. This is preferable to having decisions made in secret without explanation, resulting in the public being denied the right "to find out how [its] Government is operating" (House Report at 6). It has been suggested that "The inquiry with regard to every requested memorandum must be into the acuteness of the public's need for disclosure thereof as an agency rule or rule of decision, as against the likelihood that any resulting criticism will be concentrated on the authors of particular recommendations." Note, *The Freedom of Information Act and the Exemption for Intra-Agency Memoranda*, 86 Harv. L. Rev. 1047, 1063 (1973). In the case of the Board, it is clear that the public's need to understand the manner in which the statutory factors are applied in decided cases deserves preeminence over the sensibilities of individual Board members.

In arguing that disclosure of Division reports would mislead the public, the Board refers to the "common understandings and experiences" and "shared perceptions" of its members (Brief for Pet. at 28). Continued withholding of these Division reports from the public would only serve to widen the gulf between the public's perception and the realities of the renegotiation process. This is the evil which the FOIA sought to correct, because, as the Attorney General recognized, the public has a need for "the statement of principles and standards, and the rationale and explanation of agency policy, set forth in agency decisions which determine private rights and obligations." *Attorney General's Memorandum* at 18. The Board, in failing to recognize this, is depriving the public of a full awareness of the manner in which the Board is implementing its statutory responsibilities.

C. Regional Board Reports are not Exempt from Disclosure

The Board's arguments concerning the applicability of Exemption 5 to Regional Board reports are no more compelling than they are to Division reports. As discussed, *supra*, at pp. 15-16, Congress contemplated that the Board would delegate certain functions, powers and duties to agencies which the Board has the power to create.

At the time this action was commenced, the Board's regulations provided, as follows:

> When a Regional Board *determines* in a Class A case that the contractor has not realized excessive

> profits for the fiscal year under review, the Regional Board will notify the Board of the Regional Board's *determination* and submit a report of the case to the Board. The Regional Board will notify the contractor of the action taken by the Regional Board (emphasis supplied).

32 C.F.R. § 1473.2(a) (1968).[24] It is clear from the regulations that the "report of the case" is forwarded to the Board in support of the Regional Board's "determination." Since the contractor is advised of the determination, it is no longer an intra-agency matter. Nor should the report which is prepared to justify that determination be so considered since it represents the completion of "the process of . . . issuing [a] . . . decision" by the Regional Board in its capacity as an agency. House Report at 10.

A further argument for the nonapplicability of Exemption 5 to Regional Board reports is that such a report has been made "available by law to a party other than an agency in litigation with the agency." 5 U.S.C. §552(b) (5). In a recent renegotiation case which was

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[24]This is to be contrasted with the comparable regulation presently in effect:

> When a Regional Board *finds* in a Class A case that the contractor has not realized excessive profits for the fiscal year under review, the Regional Board will make and enter a *recommendation* of clearance and submit the case to the Board. The Regional Board will notify the contractor of the action taken by registered mail and, at the same time, will furnish the contractor with a Regional Board opinion pursuant to § 1477.3 of this chapter (emphasis supplied).

32 C.F.R. § 1473.2(a) (1974). Such Regional Board Opinions are available to the public pursuant to 32 C.F.R. § 1480.5(a) (18) (1974).

before the Court of Claims for redetermination[25] the contractor made a motion for production of several documents including "The 'Report of Renegotiation' or 'Clearance Notice Report' of approximately six pages prepared by R. M. Jack, R. M. Masucio or others and approved by the Eastern Regional Renegotiation Board on or about June 23, 1969 . . ." *Lykes Bros. S.S. Co. v. United States,* Ct. Cl. No. 594-71 (Motion filed March 2, 1972).

The trial commissioner denied the contractor's motion, the contractor sought review by the Court of Claims, and the Court of Claims ordered the trial commissioner, to the extent that any formal claims of privilege were raised by the defendant, to consider the documents *in camera* "for the purpose of excluding or excising from the documents intra-agency advisory opinions or recommendations, trade secrets, or commercial or financial information obtained from persons outside the Government under an express or implied agreement that such information or trade secrets will be kept confidential." *Lykes Bros. S.S. Co. v. United States*, 198 Ct. Cl. 987, 988 (1972). The trial commissioner's subsequent order, filed on June 22, 1972, makes it clear that no claim of privilege was raised concerning "The 'Report of Renegotiation' or 'Clearance Notice Report' " and that the document was in fact delivered to the contractor.

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[25] By amendment to the Renegotiation Act, jurisdiction for the redetermination of excessive profits was transferred from the U.S. Tax Court to the Court of Claims. 50 U.S.C. App. §1218 (1971).

Since it is evident from the language of Exemption 5 that it is not applicable to documents available in litigation with the agency, the Board cannot invoke that exemption in an effort to withhold Regional Board reports from the public.

CONCLUSION

As Professor Davis has so aptly stated, "One fundamental principle is that secret law is an abomination." Davis at 137. This case seeks to cause the Board to make available to the public its final opinions in adjudicated cases so that the principles and factors which govern the renegotiation process will become generally available and will no longer be hidden in the files of the Board.

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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September 1974

APPENDIX

The Renegotiation Board's creation of and delegation of authority to Regional Boards, contained in 17 Fed. Reg. 1401 (1952), is as follows:

Regional Boards

Delegation of Authority With Respect to Certain Functions, Powers and Duties

Pursuant to section 107 (d) and (f) of the Renegotiation Act of 1951:

1. There are hereby created four Regional Boards which shall consist of five members each, and which are hereby designated as the Washington Regional Board, the New York Regional Board, the Chicago Regional Board, and the Los Angeles Regional Board, respectively.

2. For the purpose of this delegation:

(a) The term "Board" means The Renegotiation Board.

(b) The term "Regional Board" means a Regional Board created by the Board by section 1 of this delegation.

3. The Board hereby delegates to each Regional Board the following functions, powers, and duties:

(a) To conduct renegotiation under the Renegotiation Act of 1948 and the Renegotiation Act of 1951 with the contractor or subcontractor in any case which is assigned by the Board to such Regional Board.

(b) To make a determination of excessive profits with respect to any such contractor or subcontractor.

(c) To issue clearances and enter into refund agreements embodying determinations of excessive profits made by such Regional Board in cases designated by the Board as Class A cases, *Provided*, That the Board in each case has advised the Regional Board that the Board is in accord with such determination.

(d) Subject to such review as may be prescribed by the Board by regulations or otherwise, to issue clearances, enter into refund agreements, or issue unilateral orders embodying determinations of excessive profits made by such Regional Board in cases designated by the Board as Class B cases.

4. No function, power or duty herein delegated shall be redelegated.

5. This delegation is subject to revocation or modification in whole or in part at any time.

Dated: February 8, 1952.

JOHN T. KOEHLER,
Chairman,
The Renegotiation Board.

Supreme Court, U.S.
FILED
NOV 16
MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1316

THE RENEGOTIATION BOARD,

Petitioner,

—v.—

GRUMMAN AIRCRAFT ENGINEERING CORPORATION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR AMERICAN CIVIL LIBERTIES UNION AND CONSUMERS UNION OF UNITED STATES, INC., *AMICI CURIAE*

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 73-1316

THE RENEGOTIATION BOARD,

Petitioner,

-v.-

GRUMMAN AIRCRAFT ENGINEERING CORPORATION,

Respondent.

On Writ of Certiorari
To The United States Court of Appeals
For The District of Columbia Circuit

BRIEF FOR AMERICAN CIVIL LIBERTIES UNION AND CONSUMERS UNION OF UNITED STATES, INC., AMICI CURIAE

Interest of Amici [1/]

The American Civil Liberties Union is a

1/ Letters from both of the parties, consenting to the submission of this brief, have been filed with the Clerk of the Court.

nationwide, non-partisan organization of more than 250,000 members dedicated solely to the preservation of the liberties safeguarded by the Bill of Rights. During its fifty-four year existence the ACLU has been particularly concerned with the freedoms protected by the First Amendment to the Constitution, and in recent years it has represented numerous citizens requesting disclosure of information from executive agencies of the Government under the Freedom of Information Act.

The Consumers Union of United States, Inc., ("Consumers Union") is a nonprofit membership organization chartered in 1936 under the laws of the State of New York to provide information, education and counsel about consumer goods and services and the management of the family income. Consumers Union's income is derived solely from the sale of Consumer Reports (magazine and TV) and other publications. Expenses of occasional public service efforts may be met, in part, by nonrestrictive, noncommercial grants and fees. In addition to reports on Consumers Union's own product testing, Consumer Reports, with its 2.2 million circulation, regularly carries articles on health, product safety, marketplace economics, and legislative, judicial and regulatory actions which affect consumer welfare. Consumers Union's publications carry no advertising and receive no commercial support. In connection with its product testing, publishing, and other activities, Consumers Union frequently requests information from govern-

ment agencies.2/

The public's right to know the bases and criteria for decisions made by government agencies is inherent in our system of government. The Freedom of Information Act was passed by Congress to ensure that the public would be able to know how executive agencies were discharging their functions. Amici Curiae believe that this case and its companion, National Labor Relations Board v. Sears, Roebuck & Company, No. 73-1233, present important questions concerning the reach of the Act to prevent the development of "secret law" by administrative agencies.

Question Presented

Whether the Freedom of Information Act requires public disclosure of reports relied upon by an agency in making final decisions where the agency does not issue any formal opinions explaining its decisions?

2/ The first lawsuit under the Freedom of Information Act was brought by Consumers Union to obtain hearing aid test data and scoring methodologies from the Veterans Administration. Consumers Union v. Veterans Administration, 301 F. Supp. 796 (S.D.N.Y. 1969), appeal dismissed as moot, 436 F.2d 1363 (2d. Cir. 1971). Consumers Union was also amicus curiae in Getman v. N.L.R.B., 450 F.2d 670, 673, n. 25 (D.C. Cir. 1971).

Statute Involved

The Freedom of Information Act, Title 5, U.S.C. § 552 (hereafter "the Act"), is set forth in an appendix to the petitioner's brief, at pp. 41-44.

Statement of the Case

The respondent, Grumman Aircraft Engineering Corporation (hereafter "Grumman"), commenced this action under the Act to compel the Renegotiation Board (hereafter "the Board") to disclose certain documents explaining decisions of the Board and its decision-making delegates, the Regional Boards, as to whether particular companies had accrued excess profits in their business with the government.

The suit was brought in 1968, at a time when the Board did not disclose its final opinions in any form, but merely issued decisions without explanation. Initially, the Board asserted that the requested documents contained confidential information covered by the Act's exemption for "trade secrets and commercial and financial information obtained from a person and privileged or confidential" [5 U.S.C. § 552(b)(4)]. The Court of Appeals reversed a decision by the District Court upholding the Board's claimed exemption, and remanded the case for a determination of what documents in fact constitute "final opinions" of the Board subject to disclosure under the Act's mandatory affirmative provi-

sions.3/ Grumman Aircraft Engineering Corporation v. Renegotiation Board, 425 F.2d 578 (D.C. Cir. 1970).

Following discovery on remand, including a deposition of the Board's Chairman, the District Court held on the basis of the evidence before it that "a final opinion [of the Board] is that document which states conclusions and reasons upon which the Board has acted as well as any dissents and concurrences thereunto" [Pet. App. C, at 40A]. The court further decided, as an issue of fact, that a final opinion of the Board could be, depending on the particular circumstances, either:

3/ 5 U.S.C. §§ 552(a)(2)(A) and (B) provide as follows:

> (2) Each agency, in accordance with published rules, shall make available for public inspection and copying...
>
> (A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;
>
> (B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register [emphasis supplied].

(1) a Summary of Facts and Reasons; 4/ (2) a report and recommendation of a Division of the Board (consisting of three of the Board's five members); (3) a report of a Regional Board; or (4) a Statement of Facts and Reasons.5/

The Board appealed the District Court's conclusion that Division reports and Regional Board reports are in fact "final opinions ... made in the adjudication of cases," claiming as it does here that both types of reports are merely "advisory" and do not ne-

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4/ Following the District Court's decision on remand, the Board amended its regulations to permit public inspection and copying of such Summaries. 39 Fed. Reg. 13650 (1974). In its brief the Board has neglected to indicate that this amendment was made in an apparent response to the mandate of the District Court. See Pet. Br., at 7-8. In any event, the Board has abandoned its claim that a Summary of Facts and Reasons is exempt from disclosure.

5/ The Court of Appeals in its first decision, 425 F.2d at 579, had already held that a Statement of Facts and Reasons was subject to disclosure under the Act, and the Board has not disputed this holding.

cessarily reflect, in the words of the court below, the "unrecorded and undisclosed reasons" for a National Board decision [Pet. App. A, at 4A]. The Court of Appeals again rejected the Board's contentions, holding that the District Court had correctly concluded that whenever the Board issues a decision without formally disclosing any reasons, the Regional and Division reports explaining the basis for such a decision are necessarily the same as "final opinions".

Furthermore, the Court of Appeals found two additional grounds for affirming the District Court. First, the Regional Boards are "agencies" within the meaning 5 U.S.C. § 552 (a), whose final reports must be disclosed regardless of their relationship to the National Board. Second, even if, arguendo, the documents at issue do not fall within the Act's mandatory affirmative provisions [5 U. S.C. § 552(a)(2)], they are nevertheless "identifiable records" which must be disclosed under 5 U.S.C. § 552(a)(3) and are not covered by any of the Act's exemptions [5 U.S.C. § 552(b)].

Introduction and Summary of Argument

The issue in this case is whether an administrative agency can be permitted to keep secret the reasons for its decisions simply by choosing not to issue formal opinions explaining those decisions. Throughout this litigation the Renegotiation Board has taken the position that Grumman's claim and the decisions of the courts below are based on a

"false assumption that all agencies must write opinions" [Pet. Br., at 21]. This argument misses the point of the case, which is not that a formal opinion-writing requirement must be imposed on administrative agencies, but rather that any documents explaining the reasons for a particular administrative decision must be disclosed when no formal opinion is issued.6/

For many years the Renegotiation Board has functioned in almost total isolation from public scrutiny, neither explaining its decisions nor publishing the criteria for making them. Only as a result of this case has the Board been forced to recognize that its longstanding policy of not issuing formal opinions does not insulate it from a statutory obligation to disclose any document which is the functional equivalent of a final opinion. Whatever label the Board may apply

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6/ However, the imposition of sanctions by an administrative agency without a cogent statement of reasons raises serious constitutional questions. See United States v. Holby, 477 F.2d 649, 656-57 (2nd Cir. 1973); United States ex rel. Checkman v. Laird, 469 F.2d 773 (2d Cir. 1972); United States v. Broyles, 423 F.2d 1132 (3rd Cir. 1970); United States v. Houghton, 413 F.2d 736 (9th Cir. 1969). See also Joseph v. United States, 405 U.S. 1006 (1972); Fein v. United States, 405 U.S. 365 (1972).

to a particular document explaining a decision reached or a policy adopted, that document must be disclosed under subsections (a)(2)(A) and (B) of the Act. Furthermore, such a document is by definition not exempt from disclosure under subsection (b)(5) just because the agency has labelled it an "advisory report" or a "staff memorandum", since it is the functional equivalent of a "final opinion" or a "statement of policy... which [has] been adopted."7/

The reason for compelling the disclosure of the reports at issue in this case is not obscure. The record amply demonstrates that the Renegotiation Board simply does not want to explain its decisions, preferring instead to enshroud its functions in secrecy and to issue ultimatums to the parties before it. This practice is an intolerable burden on the public, since millions of taxpayer dol-

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7/ The Court of Appeals explained succinctly and correctly that "the two sections are mutually exclusive. By definition 'final opinions, including concurring and dissenting opinions' cannot be 'inter-agency or intra-agency memorandums'.... Congress in enacting the exemption, did not mean for agencies to refuse disclosure of documents merely on the ground that such documents were customarily circulated only within the bureaucracy" [Pet. App. A, at 12A, 14A].

lars are at issue in every Board decision. Taken to its essentials, therefore, this case turns on the fundamental premise of the Freedom of Information Act that "secret law is an abomination." Stokes v. Brennan, 476 F.2d 699, 702 n. 3 (5th Cir. 1973), quoting K. Davis, ADMINISTRATIVE LAW TREATISE 114, 137 (Supp. 1970).8/ The Sixth Circuit Court of Appeals recently explained this premise in terms pertinent to this case and reflec-

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8/ See also Sterling Drug, Inc. v. FTC, 450 F.2d 698, 708 (D.C. Cir. 1971); Tax Analysts and Advocates v. Internal Revenue Service, 362 F. Supp. 1298, 1310 (D.D.C. 1973), aff'd, ___ F.2d____, (D.C. Cir. August 19, 1974); Vaughn v. Rosen, ___ F. Supp. ____ , Slip Op. at 506 (D.D.C. October 9, 1974), on remand from 484 F.2d 820 (D.C. Cir. 1973), cert denied, ___ U.S. ____ (March, 18, 1974). Compare EEOC v. Los Alamos Constructors, ____ F. Supp. ____ , 43 L.W. 2169 (D.N.M. October 9, 1974)("Those unfortunate enough to be forced into litigation with the government still face agency insistence of trial be ambush.... Appointment to office does not confer upon a bureaucrat the right to decide the rules of the game applicable to his crusades....[I]t seems to be endemic with government employees to say that their agency is in sanctimonious hot pursuit of a Holy Grail which immunizes them from the demands of fair play and the requirement of due process of law....").

tive of the interests of amici:

> One of the reasons for the First Amendment, as well as the Freedom of Information Act, is to promote honesty of government by seeing to it that public business functions under the hard light of public scrutiny. Tennessean Newspapers v. FHA, 464 F.2d 657, 660 (6th Cir. 1972).

Argument

I

THE REGIONAL BOARD AND DIVISION REPORTS ARE FINAL OPINIONS SUBJECT TO DISCLOSURE UNDER SUBSECTION (a)(2) OF THE ACT.

A. Documents on which an agency relies in reaching a final decision must be disclosed.

In Freedom of Information Act cases it is sometimes difficult for courts to draw lines between final agency orders, opinions and policy statements, on the one hand,and predecisional memoranda on the other. This difficulty is created by agencies such as the Renegotiation Board which operate largely in secret and do not voluntarily disclose the reasons underlying their decisions. Under these circumstances it is incumbent upon the courts, as this Court recently pointed out, to employ "the same flexible, common-sense approach that has long governed private par-

ties' discovery" of agency materials in determining what must be disclosed. Environmental Protection Agency v. Mink, 410 U.S. 73, 91 (1973).

When an agency issues an order accompanied by a detailed opinion or explanation, or makes full declaration of policy, there is no need for further disclosure. In Montrose Chemical Corporation v. Train, 491 F.2d 63 (D.C. Cir. 1974), for example, Montrose sought two summaries of evidence developed by agency personnel prior to an administrative hearing. The Court of Appeals held that the summaries were not subject to disclosure, pointing out that the agency had already published an opinion of its final decision concerning the subject matter of the hearing. Emphasizing that the agency had accompanied its decision with the release of voluminous facts and statistics, the court was satisfied that "the factual basis [and] the reasoning behind the final product" had been publicly disclosed [491 F.2d at 68].

In many instances, however, an agency will offer an incomplete explanation or no explanation at all for a decision it has reached or a policy it has adopted. See, e.g., Tax Analysts and Advocates v. Internal Revenue Service, ____ F.2d ____ (D.C. Cir. August 19, 1974), aff'g in part, rev'g in part, 362 F. Supp. 1298 (D. D.C. 1973); Hawkes v. Internal Revenue Service, 467 F.2d 787 (6th Cir. 1972). This is the practice of the Renegotiation Board, which declines

to issue opinions and leaves the parties and the public in the dark about the bases for its final decisions. In cases such as this, therefore, the courts must ascertain what documents the agency in fact relied upon in reaching a decision or adopting a policy so that the documents may be made "available for public inspection and copying" as the functional equivalent of "final opinions" or "interpretations of policy" under subsection (a)(2) of the Act.

The easiest case is presented by an agency which publicly states that it is relying on a particular document or report by incorporating a portion of it into its decision. See American Mail Lines, Ltd. v. Gulick, 411 F.2d 696 (D.C. Cir. 1969). The reliance principle enunciated in Gulick, however, necessarily applies also to cases in which the agency relies upon a document or report but does not publicly refer to it because it does not publish opinions. In Sterling Drug, Inc. v. FTC, 450 F.2d 698 (D.C. Cir. 1971), for example, the Federal Trade Commission had issued a ruling on a proposed merger without offering any explanation or reasoning, or explicitly referring to any reports. The Court of Appeals ordered the District Court to determine which agency documents were "in fact" relied upon by the Commission, on the ground that "private transmittals of binding agency opinions and interpretations" are a form of forbidden "secret law" [450 F.2d at 708]. The court held that the principle of Gulick could not be limited to documents publicly referred to by an agency, but must ne-

cessarily cover any documents in fact relied upon:

> Gulick does not by its express terms require this result, since in that case we relied to some extent on the fact that the agency document containing the reference to the staff memoranda was made public. The result is nonetheless necessary to prevent the development of secret law within the Commission [450 F.2d at 707].9/

A similar analysis was employed by the Ninth Circuit in General Service Administration v. Benson, 415 F.2d 878 (9th Cir. 1969), which held that documents never made public or referred to by the agency were subject to disclosure to the extent that they were in fact "statements of policy and interpretations which have been adopted" within the meaning of subsection (a)(2) of the Act.

9/ The Sterling majority held that documents prepared by the Commission staff and by individual members of the Commission, "most of [which] were written after the Commission's decision" [450 F.2d at 706] [emphasis supplied], would not have to be disclosed "unless adopted by the Commission" [Id., at n. 7]. The dissent in Sterling disagreed with the majority's conclusion that the documents had not been adopted.

B. Regional Board Reports

The courts below correctly applied the "reliance" standard to the decision-making process of the Renegotiation Board and concluded that Regional Board reports are in fact relied upon in making final decisions. The Court of Appeals held that these reports are the functional equivalent of final opinions of the National Board, but that in any case they constitute final opinions of the Regional Boards, which are themselves "agencies" within the meaning of the Act.10/

The Board relies solely on the testimony of its chairman to support its assertion that it neither adopts nor relies upon Regional Board reports in making decisions. The chairman testified that the Board "simply approves or disapproves the clearance [action recommended by a regional board]. It does not adopt any of the memoranda that are before it" [365 F. Supp. at 1149].

10/ Amici adopt the thorough treatment of the question of a Regional Board's status as an agency in the opinion of the Court of Appeals [Pet. App. A, at 3A-13A]. See also, Washington Research Project, Inc. v. HEW, ____ F.2d____, No. 74-1027 (D.C. Cir. September 12, 1974) in which the opinion below, is discussed at length at Slip Op., 11-17.

Neither of the courts below was persuaded by this assertion. The District Court found that a Regional Board report contains the facts and the reasoning for the recommendation made in the report. Since the issuance of an unexplained clearance notice by the National Board is "meaningless", the court concluded that "the reasons behind the clearance notice must be made available and in this type of case such facts and reasons are found in the Regional Board's report" [325 F. Supp. at 1153].

The Court of Appeals held that the Board's nomenclature could not determine disclosure under the Act. An agency cannot refuse to disclose documents simply because such documents are customarily circulated only within the bureaucracy. See Bristol-Myers Company v. FTC, 424 F.2d 935, 939 (D.C. Cir. 1970). To the extent that the Board accepts the bottom line recommendation of a Regional Board report without issuing any explanation of its own, that adopted recommendation is meaningless without the calculations and explanations in the rest of the report. Otherwise, "the world is... left in doubt as to either the factual basis or the reasoning behind" the Board's decision, Montrose Chemical Corporation v. Train, 491 F.2d at 68, and the purpose of the Act is thereby circumvented.

C. Division reports

When the Board does not agree with a recommendation of a clearance or agreement prepared by the Regional Board, a division of

the Board composed of three of the five members investigates and writes a report for consideration by the full Board [32 C.F.R. 1472.4 (1972)].

The Board considers the recommendations of the Division and then votes in the case. In those instances where the Board adopts the recommendations, it nevertheless contends in this litigation that only the report's conclusion, but not the report itself, is adopted. This assertion was similarly unpersuasive to the courts below. The District Court concluded from the evidence that a Division Report "represents the reasons why at least a majority of the Board decided clearance should issue. If not specifically adopted by a majority of the Board it at least represents one member's analysis of the issues and reasons for deciding that a clearance should issue and would be a concurring opinion" [325 F. Supp. at 1153].

Division Reports are by definition opinions prepared by agency decision-makers to justify their decisions. The reports are prepared when the Board does not accept the recommendations of the Regional Board. The Division offers a different recommendation with supporting evidence and reasoning, which at the very least becomes a "concurring or dissenting opinion" in the final decision of the full Board, and is therefore subject to disclosure under the express terms of subsection (a)(2)(A) of the Act.

II

REPORTS WHICH MUST BE DISCLOSED AS FINAL OPINIONS ARE NOT COVERED BY THE FIFTH EXEMPTION OF THE ACT.

The Board in its brief has attempted to demonstrate that its Regional and Division Reports are covered by the exemption in the Act for "inter-agency or intra-agency memorandums or letters which would not be available by law to a part other than an agency in litigation with the agency" [5 U.S.C. § 552(b)(5)]. Since this exemption cannot by definition apply to documents subject to disclosure as the "final opinions" of an agency within the terms of subsection (a)(2)(A) of the Act, the court below correctly recognized that it was unnecessary to reach the Fifth Exemption claim in order to uphold the District Court. The exemption is relevant only to the extent that the reports are not "final opinions", but are merely "identifiable records" covered by subsection (a)(3), the catch-all affirmative provision of the Act.11/ Even under the broader "identifiable records" standard, however, the reports are not covered by the Fifth Exemption.

In Environmental Protection Agency v. Mink, 410 U.S. at 91, this Court gave the Fifth Exemption a "flexible, common sense" construction consistent with underlying con-

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11/ See note 7, supra.

gressional intent "to delimit the exception as narrowly as consistent with efficient Government operation." S. Rep. No. 813, 89th Cong., 1st Sess. (1965), at 9. See also H.R. Rep. No. 1497, 89th Cong., 2d Sess. (1966), at 10. As the Court pointed out:

> [T]he privilege that has been held to attach to intragovernmental memoranda clearly has finite limits, even in civil litigation. In each case, the question was whether production of the contested document would be 'injurious to the consultative functions of government that the privilege of nondisclosure protects.' Kaiser v. Aluminum & Chemical Corp., 157 F. Supp. at 946 [410 U.S. at 87].

Documents pertaining to the "consultative functions of government" are necessarily at the opposite end of the administrative process from documents reflecting what the House Report on the Act termed "the end product of Federal administration" [H.R. Rep. No. 1497, at 7]. Documents coming within the latter category are subject to disclosure under the Act precisely because they go beyond the "free discussion of prospective operations and policy," Kaiser Aluminum & Chemical Corporation v. United States, 157 F. Supp. at 947, and reflect the substance and reasoning of administrative decisions already reached.12/

12/ Compare Boeing Airplane Company v. Cog-

In separating the "consultative" from the "decisional" stages of governmental process, it is important to bear in mind that documents generated at the "consultative" stage are not immutably "pre-decisional". What may once have been an advisory memorandum may later become a final opinion; what may at first have been a "trial balloon" may become an adopted policy. Documents privileged at one stage of the decision-making process, therefore, can lose their privileged status at the final stage, since, as this Court indicated in Mink, 410 U.S. at 87, "the privilege that has been held to attach to intragovernmental memoranda clearly has finite limits...." These limits are plainly reflected in the legislative history of the Fifth Exemption. The House Report, for example, states that:

[A] Government agency cannot always

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geshall, 280 F.2d 654, 660-61 (D.C. Cir. 1960) (documents explaining excess profits tax determination by Renegotiation Board held discoverable) with Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 40 F.R.D. 318, 327 (D.D.C.), aff'd, 384 F.2d 979 (D.C. Cir. 1966), cert. denied, 389 U.S. 952 (1967)(discovery denied because documents consisted entirely of "predecisional opinions, recommendations and deliberations"). See Dorsen and Shattuck, Executive Privilege, the Congress and the Courts, 35 OHIO ST. L.J. 1, 29-33 (1974).

> operate effectively if it is required to disclose documents or information which it has received or generated before it completes the process of ... issuing a ... decision. This clause [the Fifth Exemption] is intended to exempt from disclosure this and other information and records wherever necessary without, at the same time, permitting indiscriminate secrecy [H.R. Rep. No. 1497, at 10] [emphasis supplied].

Courts which have construed the Fifth Exemption have applied two principal limitations to its operation. First, as this Court held in Mink, 410 U.S. at 88, "purely factual material" must be disclosed even if it appears in pre-decisional, consultative memoranda, since such disclosure would not have any injurious effect on the giving of pure advice. See also Soucie v. David, 448 F.2d 1067, (D.C. Cir. 1971); Bristol-Myers Company v. FTC, 424 F.2d at 937; International Paper Company v. FPC, 438 F.2d 1349, 1358-59 (2d Cir. 1971).

Second, and of greater importance to this case, the Fifth Exemption does not extend to "final evaluations ... of existing policies" or decisions made, whether or not they contain "purely factual materials". Vaughn v. Rosen, ___ F. Supp. ____, Civil Action No. 1753-72, Slip Op. at 5-6 (D.D.C. October 9, 1974), on remand from 484 F.2d 820 (D.C. Cir. 1973), cert denied, ____ U.S. ____ (March 18,

1974). See also Stokes v. Brennan, 476 F.2d at 704. Cf. Tennessean Newspapers, Inc. v. FHA, 464 F.2d at 660. As the District Court explained in Vaughn, this second limitation recognizes that "Exemption 5 was designed to prevent premature disclosure of agency records .... Thus, the line we must draw is between pre-decisional and decisional documents" [Id., Slip Op. at 5][emphasis supplied]. On the exemption side of this line are materials which are purely prospective in nature and unrelated to any decision already made. See, e.g., Washington Research Project, Inc. v. HEW, supra (advisory memoranda of agency staff having no decision-making role);13/ Sterling Drug, Inc. v. FTC, supra (staff produced papers unrelated to existing decisions). In the language of the opinion below these cases all point to "a distinction ... between documents composed exclusively for purposes of assisting policy formulation

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13/ The opinion in Washington Research Project points out, however, that "the court does not confront a situation in which the underlying information, a summary of which is determined to be exempt, is itself secreted from public inspection,... [where] 'a different result might be reached'" [Id., Slip Op. at 22 n. 20]. That is precisely the circumstance confronting the Court in this case.

and those which serve to reflect policy already made and announced" [Pet. App. A, at 18A]. See generally Note, The Freedom of Information Act and the Exemption for Intra-agency Memoranda, 86 HARV. L. REV. 1047, 1057-61 (1973).

The Regional Board and Division reports at issue in this case reflect final agency decisions already made and announced.

The adopted recommendations of subordinate staff by definition become agency policy. No staff member is personally exposed to public scrutiny when the entire agency stands behind a policy or decision which he participated in formulating. Adopted recommendations of the Regional Boards become Renegotiation Board policy; the Board itself must assume responsibility for documents explaining its policy. Discarded or unheeded advice is, of course, protected from disclosure under this formulation. A staff member playing a devil's advocate role need never defend his conduct in public, while an advisor who advances unacceptable options without "due reflection" need not explain his recommendations publicly.

Finally, the Renegotiation Board argues that release of Division reports will result in unwarranted attacks on Board members. "The possibility that publicly disclosed division reports will be seized upon as a basis for attacks upon their decisions can only lead Board members to be timid in making recommendations" [Pet. br., 26-27]. Board mem-

bers, however, are presidential appointees empowered to issue unilateral orders with respect to the elimination of excess profits [50 U.S.C. App. 1217(a)]. Members, therefore, must expect and even welcome public criticism of their decisions. To suggest that public criticism will always result in timid decision-making is to ignore the realities of public life in our system of government. Public criticism and scrutiny of governmental decision-makers is a necessary fixture of democracy which the Freedom of Information Act was intended to preserve.

Conclusion

For the foregoing reasons, the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1316

THE RENEGOTIATION BOARD, PETITIONER

v.

GRUMMAN AIRCRAFT ENGINEERING CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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1. Respondent argues (Resp. Br., p. 15) that the Regional Boards are "agencies" within the meaning of the Administrative Procedure Act and thus the FOI Act (whose reports are therefore final opinions), because they were created pursuant to 50 U.S.C. App. 1217(d), which empowers the Board to "delegate in whole or in part any function, power, or duty * * * to any agency of the Government, including any such agency established by the Board * * *." However, the use of the term "agency" (or the failure to use it) in the Board's organic statute is not controlling. Whether an office is an "agency" for the purpose of the APA depends on its powers and functions. An authority, even an authority within an agency, may itself be an "agency" for the purposes of the APA (and the FOI Act), if, *but only if,* it has power "to take final and binding action * * *." Administrative Procedure Act, Legislative History, Senate Committee on the Judiciary, 79th Cong., 2d Sess., p.13.

As we demonstrated in our main brief, Br., pp. 38-40, the Regional Boards possess no independent powers of decision in the type of case at issue here. Indeed, the regulation in effect at the time the action was commenced (and presently) so states, 32 C.F.R. 1471.2(b)(1972);[1] see 17 Fed. Reg. 1401 (1952), para. 3(c), (reprinted as an appendix to the Brief for the Respondent at p. 2A), and the district court so found. Pet. App. A, p. 29A. Thus, the Regional Boards are not "agencies" (whose recommendations constitute final opinions), but are units within the agency to whom the agency has delegated certain preliminary tasks. Their reports therefore constitute recommendations made by subordinates which, as the district court also found (Pet. App. A, p. 31A), the agency studies or considers but does not adopt.

That such subdivisions of an agency are not themselves "agencies" for the purposes of the FOI Act is confirmed by recent amendments to that Act.[2] In Section 3 of Pub. L. 93-502, 88 Stat. 1564, Congress amended the definition of "agency" in the Administrative Procedure Act so that, for purposes of the FOI Act, the term now includes such entities as the United States Postal Service, the Postal Rate Commission, and certain government corporations or government-controlled corporations. However, as the conferees on the bill which became Pub. L. 93-502 explained:

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[1]Respondent relies upon a regulation, 32 C.F.R. 1473.2(a)(1968), which refers to a "determination" of the Regional Board. But, given the explicit regulation which states that no decisional authority has been delegated to the Regional Boards, 32 C.F.R. 1471.2(b)(1972), the term "determination" cannot be read to mean "final decision."

[2]The amendments are effective 90 days from date of enactment (November 21, 1974). Pub. L. 93-502, 88 Stat. 1564.

> Expansion of the definition of "agency" [by the amendment] * * * is intended to broaden applicability of the Freedom of Information Act but it is not intended that the term "agency" be applied to subdivisions, offices or units within an agency. [S. Rep. No. 93-1200, 93d Cong., 2d Sess., p. 15]

By means of this amendment, Congress extended the number of governmental agencies to which the FOI Act applies. However, in so doing, it again made clear that it did not intend, and never did intend, the FOI Act to apply independently to subordinate advisory subdivisions of an agency, such as the Regional Boards.[3]

2. Respondent contends, alternatively (Resp. Br., p. 19), that regional board reports are "final opinions" of the statutory Board. Respondent suggests that, where the Board does not give a matter "in-depth consideration" by assigning it to a division, the Board implicitly adopts the regional board reports as the Board's "final opinion" (*ibid.*).

This contention is contrary to the explicit finding of the district court that the Board does not adopt the reports and recommendation of the Regional Boards (Pet. App. A, p. 31A), as well as the only evidence in the record. See, *e.g.*, App. 77. Moreover, the suggestion that "perfunctory review" results in the adoption of a subordinate's recommendation as a superior's "final opinion" is untenable. As the Court of Appeals for the District of Columbia Circuit recently noted, *Washington Research Project, Inc.* v. *Department of Health, Education and Welfare,* No. 74-1027, decided September 12, 1974, slip op., p. 16, petition for a writ of certiorari pending, No. 74-736, if the nature of the review accorded a subordinate's recommendation were relevant, the courts would become involved

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[3]Respondent contends (Resp. Br., p. 2) that "Summaries of Facts and Reasons" were not made public until "after this case was decided on remand by the district court [on April 26, 1971]." On February 27, 1971, the Board amended 32 C.F.R. 1480.5 to make such documents publicly available. 36 Fed. Reg. 3808; see also App. 206.

> * * * in determining the care with which decisional officers of government agencies supervise their staffs, in order to determine whether in fact the staff is not the stand-in for the officer or agency—its recommendations his decisions—and whether it ought not therefore in law to be held accountable as the agency. This * * * [the courts] cannot do. *Morgan* v. *United States,* 304 U.S. 1, 18 (1938); *United States* v. *Morgan*, 313 U.S. 409, 422 (1941).

3. In arguing that division and regional board reports are final opinions, respondent invokes the spectre of "secret law" (Resp. Br., pp. 24-25, 31). But the mere fact that these reports are undisclosed does not make them secret law. Nothing in the record of the case supports the suggestion that these documents articulate general principles to guide future agency action. Indeed respondent's accurate characterization of the documents as "the Board's evaluation of a contractor's performance under statutory factors" (Resp. Br., p. 23) shows that no "secret law" is being developed.[4] Moreover, since the Board does not adopt the reasoning of the reports (App. 79, 81), it can not constitute "secret law."

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[4]Respondent relies, Resp. Br., pp. 24-25, upon *Sterling Drug, Inc.* v. *Federal Trade Commission,* 450 F.2d 698 (C.A.D.C.). However, the court there held that staff memoranda submitted to Commissioners of the Federal Trade Commission were exempt from compelled disclosure pursuant to Exemption 5, 450 F.2d at 706-707, even though the Commission did not issue an opinion to which the memoranda related.

In addition, the court in *Sterling Drug* held that memoranda written by some of the Commissioners to the other Commissioners were also exempt from compelled disclosure pursuant to Exemption 5, in view of the need to preserve "the full flow of ideas between Commissioners." 450 F.2d at 708. The same considerations apply here. See Board Br., pp. 24-29.

Respondent attempts (Resp. Br., p. 26) to distinguish this latter holding in *Sterling Drug,* by contending that there, unlike the present case, the memoranda written by the Commissioners did not "necessarily contain a full and accurate account of the grounds for the decision." 450 F.2d at 707. But here also, as the record demonstrates, division reports do not reflect the reasons for the Board's decision. App. 79, 180.

Respondent seizes upon our reference to "shared perceptions" and "common understandings" (Board Br., p. 28) as showing that principles are being developed in secret (Resp. Br., p. 28). However, we used these terms not in the sense that disclosure of the reports would reveal bases for the Board's decisions which are not generally known, but that disclosure would reveal documents which are incomplete when viewed in terms of the ability of persons other than members of the Board to comprehend them.[4]

4. Respondent contends (Resp. Br., p. 26) that division reports are not inter-agency memoranda within exemption 5 because they "are prepared by members of the Board as a part of the decision-making process and thus reflect the views of the author in his or her decision-making capacity." However, as members of the judiciary well know, not every analysis prepared by a member of a collegiate decision-making body is designed to explain the decision which has been reached (or reasons for concurrence in or dissent from the decision). Memoranda may also be pre-

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[4]A recent decision of the Court of Appeals for the District of Columbia Circuit, *Washington Research Project, Inc.* v. *Department of Health, Education and Welfare, supra,* illustrates this point.

In that case, the court considered the applicability of Exemption 5 to certain summaries of research designs prepared by employees of the Department of Health, Education and Welfare addressed to others within the same Department. The court noted that the sample summary before it stated that the proposed research design utilized certain rating scales. These rating scales were enumerated but were neither identified nor described. Slip op., at p. 22. The summary, according to the court, merely states that the scales were said to have proved "sensitive in prior, unspecified studies." *Ibid.* Since the author and the addressee possessed "common understandings" and "shared perceptions," there was no need to describe the scales further. Had the report been designed to explain a decision to the general public, however, there may have been a need to describe the scales in detail and to discuss the studies which had proved their reliability.

pared in the course of the exchange of ideas, recommendations and positions which is an integral part of the decision-making process. These documents are tentative, exploratory, and consultative only.

As we demonstrated in our main brief, division reports are this type of memoranda. The only evidence in the record establishes that the division reports are considered by the Board members prior to decision as part of the preparation for decision but do not serve as the sole basis for decision. *E.g.*, App. 81, 180-181. The division reports are tentative, pre-decisional and consultative; they cannot be considered "final opinions."

5. Respondent argues that the regional board reports are not exempt under exemption 5, because they were ordered to be produced in *Lykes Bros. S.S. Co.* v. *United States*, Ct. Cl. No. 594-71 (Resp. Br. pp. 29-30). In that case, the plaintiff, in a proceeding to review *de novo* a Board determination of excessive profits, moved to require the Board to produce 12 documents, including a Report of Renegotiation or Clearance Notice Report. The trial commissioner denied the motion and plaintiff appealed to the Court of Claims.

The Court of Claims vacated the commissioner's order and remanded to him with directions to examine the documents *in camera* and order the production of any documents which were disclosable under

> the rules and principles announced in *Boeing Airplane Company* v. *Coggeshall*, 280 F. 2d 654 (D.C. Cir. 1960), or *Grumman Aircraft Engineer. Corp.* v. *Renegotiation Bd.*, 425 F.2d 578 (D.C. Cir. 1970), 325 F. Supp. 1146 (D.C. 1971).

As we have noted, the division and regional board reports would not be routinely available in discovery pursuant to *Boeing Airplane Co.* v. *Coggeshall, supra.* To the extent they were made available in *Lykes Bros. S.S. Co.* v. *United States, supra,* they were made available pursuant to the order of the Court of Claims, which in turn relied upon the district court opinion in this case (325 F. Supp. 1146), which the court of appeals affirmed and which is now before this Court.

For the foregoing reasons, as well as the reasons set forth in our main brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

JANUARY 1975.

(Slip Opinion)

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

RENEGOTIATION BOARD *v.* GRUMMAN AIRCRAFT ENGINEERING CORP.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 73-1316. Argued January 14, 1975—Decided April 28, 1975

Pursuant to the Government contract renegotiation process in effect under the Renegotiation Act of 1951 for so-called Class A cases (those in which the contractor reported profits of more than $800,000 on the relevant contracts) during the period involved in this case, if the Regional Board made a recommendation as to the amount of excessive profits in the year in issue rather than recommending a clearance, *i. e.*, a unilateral determination that a contractor realized no excessive profits during the year in issue, the case, if the contractor declined to enter into an agreement, would be reassigned to the Renegotiation Board (the Board). The case file, including the Regional Board Report, was then transmitted to the Board and assigned to a division of the Board, usually consisting of three of its five members, which in due course would make its own decision and submit to the full Board a Division Report, including a recommendation for final disposition of the case. If the Regional Board concluded that no excessive profits had been realized and that a clearance should therefore issue, a "final recommendation" that a clearance be issued was sent to the Board, which considered the case on the basis of the Regional Board Report. Respondent brought an action pursuant to the Freedom of Information Act (FOIA), 5 U. S. C. § 552, seeking disclosure of certain Regional Board Reports resulting in a recommendation of clearance and Board approval, and of Division Reports in other cases, all related to and issued during renegotiation proceedings involving 14 other companies during the period 1962–1965. The District Court ultimately granted relief on the grounds that both the Regional Board and Division

Syllabus

Reports were "final opinions" within the meaning of § 552 (a) (2) (A), which requires a Government agency to make available to the public "final opinions, including concurring and dissenting opinions, as well as orders made in the adjudication of cases," and were not exempt from disclosure under § 552 (b) (5) (Exemption 5) as "inter-agency or intra-agency memorandums . . . which would not be available by law to a party other than an agency in litigation with the agency." The Court of Appeals affirmed, further holding that even if the Regional Board Reports were not "final opinions" of *the Board*, they were disclosable as final opinions of the Regional Board, which was to be considered an "agency" for purposes of the FOIA. *Held:* Neither the Regional Board nor Division Reports are final opinions and thus do not fall within Exemption 5, since (1) only the full Board has the power by law to make the decision whether excessive profits exist; (2) both types of Reports are prepared prior to that decision and are used by the Board in its deliberations; and (3) the evidence fails to support the conclusion that the reasoning in the Reports is adopted by the Board as *its* reasoning, even when it agrees with the Report's conclusion. Pp. 15–21.

(a) The Regional Board Reports, being prepared long before the Board reached its decision and being used by it as a basis for discussion, are precisely the kind of predecisional deliberative advice and recommendations contemplated by Exemption 5 which must remain uninhibited and thus undisclosed, in order to supply maximum assistance to the Board in reaching its decision. Regardless of whether the Regional Boards are agencies for Class A purposes so that their final recommendations are *inter*-agency memoranda, or are not agencies separate from the Board so that their recommendations are *intra*-agency memoranda, the Regional Boards' total lack of decisional authority brings their Reports within Exemption 5 and prevents them from being "final opinions." Pp. 16–20.

(b) Since the Division Reports were prepared before the Board reached its decision and to assist it in its deliberations, and were used by the full Board as a basis for discussion, the Board should not be deprived of such a thoroughly uninhibited version of this valuable deliberative tool by making such Reports public on the unsupported assumption that they always disclose the final views of at least some Board members. Pp. 20–21.

157 U. S. App. D. C. 121, 482 F. 2d 710, reversed.

Syllabus

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, MARSHALL, BLACKMUN, and REHNQUIST, JJ., joined. DOUGLAS, J., dissented. POWELL, J., took no part in the consideration or decision of the case.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 73–1316

The Renegotiation Board, Petitioner, *v.* Grumman Aircraft Engineering Corporation. | On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[April 28, 1975]

MR. JUSTICE WHITE delivered the opinion of the Court.

The issue in this case is whether certain documents—documents generated by the Renegotiation Board (the Board) and by its Regional Boards in performing their task of deciding whether certain Government contractors have earned, and must refund, "excessive profits" on their Government contracts—are "final opinions" explaining the reasons for agency decisions already made, and thus expressly subject to disclosure pursuant to the Freedom of Information Act (the Act), 5 U. S. C. § 552 (a)(2)(A), or are instead predecisional consultative memoranda exempted from disclosure by 5 U. S. C. § 552 (b)(5). See *National Labor Relations Board* v. *Sears, Roebuck & Company, ante,* at p. ——.

I

Essential to the consideration of whether the documents at issue in this case must be disclosed pursuant to the relevant provisions of the Act is an understanding of the renegotiation process, a process that itself serves to define the documents in issue and hereinafter described.[1]

[1] *Id.*, at 13–16. See generally S. Rep. No. 927, 93d Cong., 2d Sess., at 1–2 (1974); Staff Review of Recommendations Made on the

Under the Act, the Government is entitled to recoup from those who hold contracts or subcontracts with certain departments of the Government any "excessive profits" received by such persons on such contracts. The amount of the profits which will be considered "excessive" in connection with a particular contract depends upon six statutory factors which are set forth in the margin.[2] As the

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Renegotiation Process: A Preliminary Report 3–5 (1974) (prepared for the use of the Committee on Ways and Means, U. S. House of Representatives, and the Committee on Finance, U. S. Senate, by the staff of the Joint Committee on Internal Revenue Taxation (hereinafter *Staff Review*)).

[2] Section 1213 (e) reads, as follows:

"(e) The term 'excessive profits' means the portion of the profits derived from contracts with the Departments and subcontracts which is determined in accordance with this title [sections 1211–1233 of this Appendix] to be excessive. In determining excessive profits favorable recognition must be given to the efficiency of the contractor or subcontractor, with particular regard to attainment of quantity and quality production, reduction of costs, and economy in the use of materials, facilities, and manpower; and in addition, there shall be taken into consideration the following factors:

"(1) Reasonableness of costs and profits, with particular regard to volume of production, normal earnings, and comparison of war and peacetime products;

"(2) The net worth, with particular regard to the amount and source of public and private capital employed;

"(3) Extent of risk assumed, including the risk incident to reasonable pricing policies;

"(4) Nature and extent of contribution to the defense effort, including inventive and developmental contribution and cooperation with the Government and other contractors in supplying technical assistance;

"(5) Character of business, including source and nature of materials, complexity of manufacturing technique, character and extent of subcontracting, and rate of turn-over;

"(6) Such other factors the consideration of which the public interest and fair and equitable dealing may require, which fac-

Board's name suggests, it endeavors to, and in fact does, conclude the vast majority of its cases by agreement. 50 U. S. C. App. § 1215 (a). Absent an agreement, however, the Board must decide either to issue a "clearance," *i. e.*, a unilateral determination that the contractor realized no excessive profits during the year in issue; or to issue a unilateral order fixing excessive profits at a specified amount and directing the contractor to refund them. The unilateral order is final unless a *de novo* determination of excessive profits is sought within 90 days before the Court of Claims.[3] It is in those cases not terminated by agreement that the documents at issue in this case are generated.[4] With this in mind, we turn to the details of the renegotiation process as it existed during the period relevant to the decision in this case.[5]

Persons holding contracts or subcontracts with certain departments of the Government were required to file fi-

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tors shall be published in the regulations of the Board from time to time as adopted."

These statutory "factors" were developed by the War Contracts Price Adjustment Board during World War II, were incorporated by Congress into the original renegotiation and revenue acts of that era, were continued in the Renegotiation Act of 1951, and have undergone little change since their initial development. *Staff Review*, n. 1, *supra*, at 23 & nn. 34–36.

[3] Prior to July 1971, *de novo* review was by the Tax Court.

[4] Through 1971, 3,524 out of 4,006 cases not resulting in clearances terminated by agreement. Of the remaining 482 cases, the Board's unilateral orders were challenged in court in 203 cases.

[5] The description of the renegotiation process is of the process existing between 1962 through 1965—the period in which the documents relevant to this case were generated within the Board—notwithstanding changes made since. Unless otherwise indicated, all citations to the Code of Federal Regulations throughout this opinion are to the Renegotiation Board's regulations in effect during this period (*i. e.*, the Code as revised January 1, 1966).

nancial statements as prescribed by the Board, 50 U. S. C. App. § 1215 (e)(1), 32 CFR part 1470, if their receipts from those contracts met the requisite jurisdictional amount, 50 U. S. C. § 1215 (f). These statements were reviewed by the staff of the Board, and, if that initial review indicated the possibility that the contractor realized "excessive" profits, the "case" was referred to one of two Regional Boards for further action.[6] At the time of this assignment, each case was designated as a Class A case or Class B case: the former if the contractor had reported profits of more than $800,000 on the relevant contracts covered in his financial statement, and the latter in all other cases.[7] The principal difference between Class A cases and Class B cases was that the Regional Boards had some final decisional authority in the latter and none in the former. 32 CFR §§ 1471.2 (b), 1473.2 (a), 1474.3 (a), and 1475.3 (a). Since the documents sought by respondent in this case were all generated in Class A cases, only the procedure applicable to those cases will be discussed.

After reference to a Regional Board, a case was usually assigned to a staff team comprised of an accountant and a renegotiator.[8] This team, after determining

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[6] The reference is normally made on the basis of geographical considerations, 32 CFR § 1471.2 (a). These Regional Boards were established in 1952 by regulation, 32 CFR § 1451.32, pursuant to statutory authorization, 50 U. S. C. App. § 1217 (d). Unlike members of the Board, who are appointed to the Board by the President, Regional Board members are civil servants.

[7] Under certain circumstances, cases may be redesignated after their initial designation. 32 CFR § 1471.2 (f).

[8] During the years 1962–1965, a renegotiator might be a staff member employed by the Regional Board or a member of the Regional Board itself. Under the Board's current regulations, a member of the Regional Board who acts as a renegotiator in a specific case is thereafter barred from participation in the case as a member

what further information from the contractor was required, secured such information and received any submissions the contractor might have wanted to make with regard to his case, including his position concerning the statutory factors that largely determined whether he had received "excessive profits," 50 U. S. C. App. § 1213 (e). A document entitled "Report of Renegotiation" was then prepared by the team. Part IA of that report, the accountant's section, contained pertinent financial and accounting data and was furnished to the contractor upon request.[9] Part II of the Report of Renegotiation, prepared by the renegotiator, and not furnished to the contractor, generally contained "an analysis and evaluation of the case; and a recommendation with respect to the amount, if any, of excessive profits for the fiscal year under review." 32 CFR § 1472.3 (d). According to testimony given in this case, a Part II in outline form would be as follows:

"A. Sources of Information
"B. Application of Statutory Factors:
"1. Character of Business
"2. Capital Employed
"3. Extent of Risk Assumed
"4. Contribution to the Defense Effort
"5. Efficiency
"6. Reasonableness of Costs and Profiits
"(a) Costs
"(b) Pricing

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of the Regional Board. 32 CFR § 1472.3 (d). There was no comparable regulation in effect during the period relevant to this case.

[9] 32 CFR § 1472.3 (d). Under 1972 amendments to the regulations, the Report of Renegotiation was discontinued and was replaced by other reports not relevant to this case. See generally 32 CFR §§ 1472.3 (e), (f), (g), and (i) (1974).

"(c) Profits

"C. Special Matters

"D. Conclusion and Recommendation."

After a Report of Renegotiation was prepared, but prior to its submission to the Regional Board, the team assigned to the case endeavored to meet with the contractor to resolve "any issues or disputed matters of fact, law or accounting." 32 CFR § 1472.3 (b). The Report was then submitted to the Regional Board.

After reviewing the Report of Renegotiation and the case file, the Regional Board would make a "tentative recommendation with respect to the amount of excessive profits realized in the fiscal year under review." 32 CFR § 1472.3 (e).[10] This "tentative recommendation" could "be in an amount greater than, equal to, or less than the amount recommended in the Report of Renegotiation." *Ibid.* After a "tentative recommendation" was made, the contractor, unless he declined, attended a meeting with the renegotiation team at which he was informed of the tentative recommendation of the Regional Board, as well as the Regional Board's reasons therefor, and was afforded the opportunity to respond. The Regional Board would then enter a "final recommendation" either that a clearance be issued or that excessive profits be found in an amount greater than, equal to, or less than the tentative recommendation reached previously. If this final recommendation of the Regional Board corresponded to that of the staff team or panel, the report would be signed by the chairman of the Regional Board, signifying the approval of the staff or panel recommendation; if the Regional Board's final recommendation differed from the prior recommendation, an addendum

[10] Under current regulations, the Regional Board no longer makes this "tentative recommendation" in Class A cases, 32 CFR §§ 1472.3 (k) and (*l*) (1974).

would be attached to the report. The Report of Renegotiation with addenda, if any, will hereafter be referred to for convenience as the Regional Board Report.

(i)

Assuming the Regional Board did *not* recommend a clearance, it notified the contractor of its final recommendation in an effort to obtain an agreement. Toward this end, the contractor, upon request, would be furnished a "summary of facts and reasons" (Summary) upon which the recommendation was based. 32 CFR § 1472.3 (i).[11] If a contractor did not request such a document, there is no indication that one was ever prepared in his case.

If the contractor declined to enter into an agreement, the case was then reassigned to the Board, to which the case file including the Regional Board Report was transmitted. The case was then assigned to a "division" of the Board, usually consisting of three of its five members.

[11] This document was made available to the general public by regulation on February 24, 1971. 32 CFR § 1480.5 (a) (1972). When the Board first made the summaries of facts and reasons available to the public by regulation, it specifically stated that its action was taken "[w]ithout regard to the provisions of 5 U. S. C. § 552 (a) (2). . . ." 32 CFR § 1480.5 (a) (1972). Subsequent to the effective date of that regulation, the District Court in this case, notwithstanding the fact that the controversy over respondent's access to the summaries of facts and reasons sought by respondent in this action had apparently been mooted, held that these documents must be made available under the FOIA as "final opinions" of either the Board or the Regional Board, except in certain circumstances. *Grumman Aircraft Engineering Corp.* v. *Renegotiation Board*, 325 F. Supp. 1146, 1151–1152 (DC 1971). The Board has since amended its regulations, indicating that its own interpretation of the Act as to these documents is now consistent with that of the District Court. 32 CFR § 1480.5 (a) (1974). Under current Board regulations, the contractor automatically receives a document entitled "Proposed Opinion," if he has not indicated a willingness to enter into an agreement with the Board. 32 CFR § 1477.3 (a) (1974).

which would undertake a study of the case. Staff personnel would go over both Part IA and Part II of the Regional Board Report and indicate, in memoranda, their agreement or disagreement with the recommendation made by the Regional Board. At an appropriate juncture, the contractor would be afforded an opportunity to meet with the division members to discuss his case and submit additional relevant material. The division, in due course, would reach its own decision as to what recommendation should be made to the Board, "not . . . bound or limited in any manner by any evaluation, recommendation or determination of the Regional Board." 32 CFR § 1472.4 (b). The division would then submit the full Board a report of the case, prepared by one of the members (Division Report), and including a recommendation for final disposition along with additional or contrary views, if any, of the other division members. The Division Report is one of the categories of documents sought by respondent under the Act.

The Board would then meet, each member having had the opportunity to study the case file and the report submitted on behalf of the division, discuss the case, and vote on a final disposition. Neither the Board nor any of its members were bound by any prior recommendations. The Board was free, after discussion, to reject the proposed conclusion reached in the division report, or to accept it for reasons other than those set forth in the report. 32 CFR § 1472.4 (d). Assuming the Board did not decide that a clearance should issue, the contractor was then notified of the Board's conclusion and would be given, at his request, a Summary to enable him to decide whether to enter into an agreement with the Board. If an agreement was not reached, the Board would then enter a *unilateral* order within a specified time, 32 CFR part 1475, and would issue pursuant to statute, at the request of the contractor, a "statement of

such determination, of the facts used as a basis therefor, and of its reasons for such determination." 50 U. S. C. § 1215 (a) (Statement).[12] Absent a contractor's request for a Statement, there is no indication that one was ever prepared in his case. For this type of case, the renegotiation process thus came to and end.[13]

(ii)

If the Regional Board concluded that no excessive profits had been realized by a particular contractor and that a clearance should therefore issue—or if the contractor agreed with the Regional Board as to an amount of excessive profits before the case was reassigned to the Board—then a Division Report was never created in that case. Instead, a "final recommendation" that a clearance be issued or that the agreement be consummated was sent to the Board, and the Board considered the case on the basis of the Regional Board Report, together with comments made by the Board's accounting and review divisions. After meeting and discussing the case on the

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[12] The "Summaries" and "Statements" were similar in both format and content. App. 35–41, 32 CFR § 1477.4. Under current Board regulations, the Regional Board now issues to the contractor a "Proposed Opinion," in lieu of the "summary of facts and reasons" discussed above, and furnishes to the contractor a "Regional Board Opinion" when the Regional Board's recommendation is forwarded to the Board. 32 CFR § 1477.3 (a) and (c) (1974). The Board also issues a "Final Opinion" in place of the Statement at the same time as it enters a unilateral order. 32 CFR § 1477.3 (b) (1974). All of these documents are available to the public. 32 CFR § 1480.5 (a) (1974).

[13] A dissatisfied contractor had the right at this point to bring an action in the Tax Court, which had jurisdiction to determine *de novo* whether excessive profits had been realized; jurisdiction of these cases has subsequently been transferred to the Court of Claims. See *Renegotiation Board* v. *Bannercraft Clothing Co.*, 415 U. S., at 15 & n. 14.

basis of these documents, the Board decided whether to approve the Regional Board's conclusion. If it did, appropriate closing documents were prepared by the Regional Board. No explanation of the Board's reasons for agreeing with the Regional Board's recommendation was prepared or sent to the contractor; and it is not possible to know whether the Board agreed with the reasoning of the Regional Board Report or just its conclusion. If the conclusion of the Regional Board was *not* approved, the case was either returned to the Regional Board for further factfinding, or assigned to a division of the Board as though no recommendation agreeable to the contractor had ever been made. The Regional Board Reports in the category of cases in which clearances were recommended and approved by the Board—and therefore in which no Division Report was created—is the other type of document in issue in this case.

II

Against the foregoing backdrop, respondent filed a complaint, pursuant to the Act, in the District Court on June 27, 1968, seeking disclosure of "certain final opinions, orders and identifiable records" related to or issued during renegotiation proceedings involving 14 other companies during the period from 1962–1965.[14] Respondent additionally sought certain documents related to its then pend-

[14] By reference in its complaint to correspondence between it and the Board of April 26, 1968, respondent requested access to "final opinions, determinations, unilateral orders, agreements, clearance notices and letters not to proceed issued in the adjudication of renegotiation cases" and "written summaries of the facts and reasons upon which such final opinions, determinations, unilateral orders and agreements have been reached." Nothing in the complaint or the letter suggests that, at that time, respondent sought the Regional Report, or the Division Report, in any of these renegotiation cases.

ing renegotiation proceedings before the Board for 1965, but later agreed that it was not seeking access to "[i]ntra-agency memoranda and communications consisting of advisory opinions, conclusions recommendations, and analyses prepared by personnel and members of the Board" in its own case. *Grumman Aircraft Engineering Corp.* v. *Renegotiation Board*, 138 U. S. App. D. C. 138, 150, 425 F. 2d 578, 581 (1970). The District Court denied relief. On appeal, the Court of Appeals appears to have assumed that the "opinions" sought by respondent were limited to Statements and Summaries as defined in 32 CFR § 1480.8.[15] *Grumman Aircraft Engineering Corp.* v. *Renegotiation Board*, 138 U. S. App. D. C., at 148 & n. 2, 425 F. 2d, at 579 & n. 2. On this basis, the Court of Appeals reversed, rejecting the claim of the Renegotiation Board that the documents sought were "completely immune" from disclosure under 5. U. S. C. § 552 (b)(4), the provision of the Act exempting certain privileged or confidential information submitted to the Government by any person.[16] The court, stating that the Board was required to make available "final opinions, including concurring

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[15] 32 CFR § 1480.8 reads, in pertinent part:

"Except as authorized . . . opinions and orders will not be published or made available to the public . . . inasmuch as they are regarded as confidential . . . by reason of the confidential data furnished by contractors. . . . For the purposes of this paragraph, the term 'opinion' includes a statement furnished pursuant to [32 C. F. R. § 1477] and the term 'order' includes an agreement to eliminate excessive profits, as well as a unilateral determination. Opinions and orders are not cited as precedents in any renegotiation proceedings."

Section 1477, as written during the period 1962–1967, included only Statements and Summaries.

[16] 5 U. S. C. § 552 (b)(4) exempts from disclosure "trade secrets and commercial or financial information obtained from a person and privilege or confidential."

and dissenting opinions," [17] remanded the case to the District Court for further proceedings in which the requested documents were to be made available after "suitable deletions." *Id.*, at 150, 425 F. 2d, at 581.

Subsequent to the remand of the case by the Court of Appeals, the Board turned over to respondent certain documents, including Statements and Summaries, in attempted compliance with the mandate of that court. Respondent, not satisfied with the documents so disclosed, moved in the District Court for the disclosure, *inter alia*, of (1) Division Reports in all cases in which neither "Statements" nor "Summaries" were created; (2) Regional Board Reports resulting in a clearance; and (3) any document concurring or dissenting from (1) and (2) above.[18]

On the question whether these documents were "final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases," 5 U. S. C. § 552 (a)(2)(A), the District Court permitted respondent to depose the then Chairman of the Renegotiation Board. That deposition by the Chairman constitutes almost the only evidence of record in this case bearing on this question other than the pertinent statutes and regulations. Although conceding, as it had to on the basis of the Chairman's deposition, that only the Board had final decisional authority; and that it studies and considers, but does not adopt Regional or Division Reports, the District Court held that these reports were "final opinions" for purposes of the Act and rejected the

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[17] *Grumman Aircraft Engineering Corp.* v. *Renegotiation Board*, 138 U. S. App. D. C. 147, 149, 425 F. 2d 578, 580 (1970), quoting 5 U. S. C. § 552 (a)(2)(A).

[18] A more detailed description of the documents sought is set out in the opinion written by the District Court after the initial remand from the Court of Appeals, *Grumman Aircraft Engineering Corp.* v. *Renegotiation Board*, 325 F. Supp., at 1151.

Board's contention that the documents were specifically exempted from disclosure under subsection (b)(5) of the Act, 5 U. S. C. § 552 (b)(5) (Exemption 5), which encompasses:

> "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."

As to the Regional Board Reports in clearance cases, the court characterized the clearance as the "decision" of the Regional Board "unless the Board is not in accord"; and held that "in order for the public to be fully informed, the reasons behind the clearance . . . must be made available and in this type of case such . . . reasons are found in the Regional Board's report." As to the Division Reports, the court said that, although the Board may disagree with the reasoning of the report, "it is in fact the last document which explains reasons for the Board's decision," it should "at the very least reflect the analysis of one member," and thus it must be disclosed at least as a "concurring or dissenting opinion." 5 U. S. C. § 552 (a)(2)(A). On appeal, the Court of Appeals affirmed the "findings of fact" and "conclusions" reached by the District Court and found two additional grounds supportive of the lower court's judgment as to the Regional Board Reports. The court held that, even if the Regional Board Reports recommending a clearance subsequently approved by the Board [19] were not "final opinions" of *the Board*, they were disclosable as final opinions of the Regional Board: the Regional Board itself was to be con-

[19] The District Court had held the reports of Regional Boards to be disclosable only in instances where that Board made a final recommendation for a clearance and the Board concurred in the recommendation. *Grumman Aircraft Engineering Corp.* v. *Renegotiation Board*, 325 F. Supp., at 1154. The Court of Appeals did not purport to extend the holding of the District Court to Regional Board reports in other contexts.

sidered an "agency" for purposes of the Act, and the Reports were certainly *its* "final opinions" and, as such, they were disclosable under the express provisions of 5 U. S. C. § 552 (a)(2)(A) and therefore outside the scope of Exemption 5. In concluding that the Regional Boards are agencies, the court relied in part on the power of the Regional Boards finally to dispose of certain Class B cases.[20] In concluding that its decisions were "final," notwithstanding inevitable Board review, it analogized the power of the Regional Board in Class A cases to the power of a United States District Court: the former's decisions being reviewable by the Board and the latter's by a United States Court of Appeals. The fact that the Regional Board's decisions were subject to review did not obviate the fact, any more than it does in the case of a United States District Court, that its decisions are "final," *Grumman Aircraft Engineering Corp.* v. *Renegotiation Board*, 157 U. S. App. D. C. 121, 128, 482 F. 2d 710, 717 (1973), and that its report leading to a clearance was perforce a "final opinion" of an "agency" subject to disclosure under the Act. The Court of Appeals additionally held that the Regional Board reports were, in any event, "identifiable records," 5 U. S. C. § 552 (a)(3), which are disclosable, unless exempt, and that these reports were not within the purview of Exemption 5 of the Act, because they "are not solely part of the deliberative process, but rather reflect actual decisions communicated outside the agency." 157 U. S. App. D. C., at 129, 482 F. 2d, at 718. See *NLRB* v. *Sears*, *ante*, p. ——.

The Board brought the case to this Court and we granted certiorari, 417 U. S. 907 (1974), setting the case for argument with *NLRB* v. *Sears, Roebuck & Co.*, *ante*, in order to resolve the important questions presented.

[20] *Grumman Aircraft Engineering Corp.* v. *Renegotiation Board*, 157 U. S. App. D. C. 121, 126–127 & nn. 20 and 23, 482 F. 2d 710, 715–716 & nn. 20 and 23 (1973).

particularly with respect to the proper construction and interpretation of Exemption 5 of the Act. For reasons set forth hereafter, we reverse the judgment of the Court of Appeals.

III

Strictly speaking the issue in this case is whether the Division Reports and the Regional Board Reports fall within Exemption 5, pertaining to "inter-agency or intra-agency memorandums . . . which would not be available by law to a party other than an agency in litigation with the agency." 5 U. S. C. § 552 (b)(2).[21] As we hold today in the companion case of *NLRB* v. *Sears, Roebuck & Co., ante,* at p. —, Exemption 5 incorporates the privileges which the Government enjoys under the relevant statutory and case law in the pretrial discovery context; and both Exemption 5 and the case law which it incorporates distinguish between predecisional memoranda prepared in order to assist an agency decisionmaker in arriving at his decision, which are exempt from disclosure, and post-decisional memoranda setting forth the reasons for an agency decision already made, which are not. Because only the full Board has the power by law to make the decision whether excessive profits exist;

[21] Grumman claims that the documents are "final opinions" expressly made disclosable, pursuant to 5 U. S. C. § 552 (a)(2)(A). However, as we noted in the companion case of *NLRB* v. *Sears, Roebuck & Co., ante,* at p. —, a conclusion that the documents are within Exemption 5 would be dispositive in the Government's favor, since the Act "does not apply" to such documents; and a contrary conclusion would be dispositive against the Government, since it concedes that the documents are "identifiable records" disclosable pursuant to 5 U. S. C. § 552 (a)(3). Thus, strictly speaking, the question whether the documents are "final opinions" is relevant only in deciding whether Exemption 5 applies to them and is important only because we have construed Exemption 5 in *NLRB* v. *Sears, Roebuck & Co., ante,* at p. —, not to include "final opinions" within the meaning of 5 U. S. C. § 552 (a)(2)(A).

because both types of reports involved in this case are prepared prior to that decision and are used by the Board in its deliberations; and because the evidence utterly fails to support the conclusion that the reasoning in the Reports is adopted by the Board as *its* reasoning, even when it agrees with the conclusion of a Report, we conclude that the Reports are not final opinions and do fall within Exemption 5.

A. *Regional Board Reports*

It is undisputed that the Regional Boards had no legal authority to decide whether a contractor had received "excessive profits" in Class A cases.[22] In such cases, the Regional Boards could investigate and recommend, but only the Board could decide. 32 CFR § 1472.3–.4. The Reports were prepared long before the Board reached its decision. The Board used the Regional Board Report as a basis for discussion and, even when it agreed with the Regional Board's conclusion, it often did so as a result of an analysis of the six flexible statutory factors completely different from that contained in the Regional Board Report. Chairman Hartwig testified:

> "when the recommendation clearance of the Regional Board comes up on the Board agenda, the Board simply approves or disapproves the clearance.

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[22] We decline to consider whether this case would be different if the Regional Boards had *de facto* decisional authority—*i. e.* if, instead of making up its own mind in each case, the Board "reviewed" the Regional Board's recommendation under a clearly erroneous or some other deferential standard; or if the Board failed even to review the vast bulk of the reports, absent special circumstances. There is no evidence in the record indicating that the Regional Boards had such *de facto* authority. Indeed, the evidence is to the contrary. In a recent review by the Comptroller General of 209 cases, the Board concurred in the Regional Board's recommendation only 85 times. *Report*, n. 2, *supra*, at 33–34.

> It does not adopt any of the memoranda that are before it. It does not ratify or adopt any of these staff memoranda. It simply, in the exercise of its judgment, says it is a clearance or it isn't a clearance. And there is no Board-adopted document which you could call an opinion." App. 79.

The Regional Board Reports are thus precisely the kind of predecisional deliberative advice and recommendations contemplated by Exemption 5 which must remain uninhibited and thus undisclosed, in order to supply maximum assistance to the Board in reaching its decision. Moreover, absent indication that its reasoning has been adopted, there is little public interest in disclosure of a Report. "The public is only marginally concerned with reasons supporting a [decision] which an agency has rejected, or with reasons which might have supplied, but did not supply, the basis for a [decision] which was actually adopted on a different ground." *NLRB* v. *Sears, Roebuck & Co., ante,* at p. ——. Indeed, release of the Regional Board's reports on the theory that they express the reasons for the Board's decision would, in those cases in which the Board had other reasons for its decision, be affirmatively misleading. *Sterling Drug, Inc.* v. *FTC,* 146 U. S. App. D. C. 237, 246–247, 450 F. 2d 698, 707–708 (1971); *International Paper Co.* v. *FPC,* 438 F. 2d 1349, 1358 (CA2), cert. denied, 404 U. S. 827 (1971). Accordingly, these Reports are not "final opinions," they do fall within the protection of Exemption 5 and they are not subject to compulsory disclosure pursuant to the Act.

The Court of Appeals' attempt to impute decisional authority to Regional Boards by analogizing their final recommendations to the final decisions of United States District Courts must fail. The decision of a United States District Court, like the decision of the General Counsel of the NLRB discussed in *NLRB* v. *Sears,*

Roebuck & Co., ante, p. —— n. 25, has real operative effect independent of "review" by a court of appeals: absent appeal by one of the parties, the decision has the force of law; and, even if an appeal is filed, the Court of Appeals will be bound, within limits, by certain of the District Court's conclusions.[23] The recommendation of a Regional Board, by contrast, has no operative effect independent of the review: consideration of the case by the Board is not dependent on the decision by a party to "appeal"—such consideration is an inevitable event without which there is no agency decision; and the recommendation of the Regional Board carries no *legal* weight whatever before the Board—its review is, as the Court of Appeals conceded, *de novo.* Indeed, "review" is an entirely inappropriate word to describe the process by which the Board decides whether to issue a clearance following a recommendation to that effect by the Regional Board. The latter's recommendation is functionally indistinguishable from the recommendation of any agency staff member whose judgment has earned the respect of a decisionmaker. There is simply no sense in which Regional Boards have the power to make "final dispositions" and thus no sense in which the explanations of their recommendations can be characterized as "final opinions." [24] See *NLRB* v. *Sears, Roebuck & Co., ante,* at ——.

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[23] Fact determinations, for example, are reviewable under a clearly erroneous standard and certain legal judgments only for abuse of discretion.

[24] The distinction, between "recommendations" and "final opinions" subject to review, for Exemption 5 purposes is compelling. In order that a decisionmaker consider all the arguments in support of all the options, those who recommend should be encouraged to make arguments which they would not make in public and with which they may even disagree. However, if their recommendations were to have operative effect and thus qualify as decisions—even though

In concluding that the Regional Board Reports are within the scope of Exemption 5, it is unnecessary to decide whether, as respondent strenuously argues and the Court of Appeals concluded, the Regional Boards are themselves "agencies" for the purposes of the Act. Respondent and the court below proceed on the premise that the final written product of an "agency's" deliberations may never fall within Exemption 5 and reason that since the Regional Board Report is the final product of the Regional Board, it must therefore be disclosable *if* the Regional Board is a separate agency.[25] The premise is faulty, however, overlooking as it does the fact that Exemption 5 does not distinguish between *inter*-agency and *intra*-agency memoranda. By including *inter*-agency memoranda in Exemption 5, Congress plainly intended to permit one agency possessing decisional authority to obtain written recommendations and advice from a separate agency not possessing such decisional authority, without requiring that the advice be any more disclosable than similar advice received from within the agency. Thus, if the Regional Boards are agencies for Class A purposes, their final recommendations are *inter*-agency memoranda; and, if they are not agencies separate from the Board, their recommendations are *intra*-agency

subject to review—they should be *discouraged* from basing their decisions on arguments which they would not make publicly and with which they disagree.

[25] We note in passing that, while the conclusion of the court below that the Regional Board's status as an agency stemmed from its power to issue "orders" in Class B cases finds support in the cases, *International Paper Co. v. FPC*, 438 F. 2d 1348, at 1358–1359 (CA2), cert. denied, 404 U. S. 827 (1971); *Washington Research Project, Inc. v. Department of Health, Education, and Welfare*, 504 F. 2d 238 (1974), petition for cert. pending, No. 74-736, the Court of Appeals never considered the possibility that the Regional Board might be an agency for Class B purposes and not for Class A purposes.

memoranda. In either event, the Regional Board's total lack of decisional authority brings their reports within Exemption 5 and prevents them from being "final opinions."

B. *Division Reports*

It is equally clear that a division of the Board has no legal authority to decide. Once again, it may analyze and recommend, but the power to decide remains with the full Board. The evidence is uncontradicted that the Division Reports were prepared before the Board reached its decision, were used by the full Board as a basis for discussion and, as the Chairman testified, were "prepared for and designed to assist the members of the Board in their deliberations"; nor is the discussion limited to the material and analysis contained in the division report. Following the discussion, *any* Board member may disagree with the report's conclusion or agree with it for reasons other than those contained in the report. Indeed, as Chairman Hartwig testified, it is likely that this will occur because of the highly judgmental nature of the Board's decisions given the number and generality of the six statutory criteria. In any event, the reasoning of the Division Report is never adopted—though its conclusion may be—and no effort is made to reach agreement on anything but the result.

It is true that those who participate in the writing of the division report are among those who participate in the Board's decision, and that, human nature being what it is, they may not change their minds after discussion by the full Board. This creates a greater likelihood that the Board's decision will be in accordance with the Division Report than is the case with respect to a Regional Board Report and that, where the Board's decision is different, the Division Report will reflect the final views of at least one of the Board's members. See *NLRB* v.

Sears Roebuck & Co., ante, p. — n. 25. However, this is not necessarily so. The Board obviously considers its discussion following the creation of the division report to be of crucial importance to its decision for, notwithstanding the fact that a division is made up of a majority of the Board, it has been delegated no decisional authority. The member of the Board who wrote the report may change his mind as a result of the discussion or, consistent with the philosophy of Exemption 5, he may have included thoughts in the report with which he was not in agreement at the time he wrote it. The point is that the report is created for the purpose of discussion and we are unwilling to deprive the Board of a thoroughly uninhibited version of this valuable deliberative tool by making division reports public on the unsupported assumption that they always disclose the final views of at least some members of the Board.[26]

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[26] Since *all* of the members of the division are free to change their minds after deliberation and are free to place thoughts or arguments in the division reports which were only tentative in the first place, we need not reach the question whether a concurring or dissenting opinion must be disclosed even where no opinion expressing the view of the agency is written.

Respondent argues that division reports, as well as concurrences or dissents thereto, constitute "final opinions" of the Board or individual members of the Board, relying on a specific reference, assertedly made to such documents, in the House Report which accompanied the Act, H. R. Rep. No. 1497, 89th Cong., 2d Sess. (1966). That Report, in speaking to the Committee's understanding of what is now codified as 5 U. S. C. § 552 (a)(2)(A), stated that subsection (A):

"requires concurring and dissenting opinions to be made available for public inspection. The present law, requiring most final opinions and orders to be made public, implies that dissents and concurrences need not be disclosed. As a result of a Government Information Subcommittee investigation a number of years ago, two major regulatory agencies agreed to make public the dissenting opinions of their members, but a recent survey indicated that five agencies—includ-

The effect of this decision is that, in those cases in which Statements and Summaries were not issued, the public will be largely uninformed as to the basis for decisions by the Renegotiation Board. Indeed, the decisions of both courts below—conceding as they both did the absence of decisional authority in either the Regional Boards or divisions of the Statutory Board—appear to have rested in the final analysis on the notion that the Renegotiation Board has an affirmative obligation under the Act to make public the reasons for its decisions; and

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ing . . . the Renegotiation Board—do not make public the minority views of their members." H. R. Rep. No. 1497, *supra*, at 8.

This statement from the legislative history of the Act supports the proposition that Congress intended the Board to be subject to the Act's provisions, *Renegotiation Board* v. *Bannercraft Clothing Co.*, 415 U. S., at 16, and at first blush lends support to respondent's contention that Congress assumed, in passing the Act, that the Board was issuing "final opinions" in cases, that the Board was withholding concurrences and dissents to those final opinions, and that § 552 (a)(2)(A) was designed to put an end to this practice. Our research convinces us, however, that this language from the House Report is not to be so read. The "survey" referred to in the Report was conducted in 1963 by the Foreign Operations and Government Information Subcommittee of the Committee on Government Operations of the House. The unpublished data gathered during that survey indicates that, in response to three questions submitted by the subcommittee to the Board, concerning its practices with respect to opinion writing and publication, the Board stated that:

"Except as authorized in Renegotiation Board Regulations 1480.4 (a) (attached), opinions and orders of the Renegotiation Board are not published or made available to the public (see RBR [32 C. F. R. §] 1480.8). . . ."

As our prior discussion of 32 CFR § 1480.8, n. 19, *supra*, makes clear, the "opinions" to which the Board referred were Statements and Summaries. Thus, the reference to concurring and dissenting opinions in the House Report, with respect to the Renegotiation Board, was not to Division Reports but was to nonexistent concurrences to and dissents from "Statements" and "Summaries" which were already being made public.

that it must disclose its opinion *or the nearest thing to an opinion* in every case. However, Congress explicitly exempted the Renegotiation Board from all provisions of the Administrative Procedure Act except for the Public Information Section. 50 U. S. C. App. § 1221. Thus the opinion writing section of the APA, 5 U. S. C. § 557—which itself only applies to "adjudications required by statute to be determined on the record after opportunity for an agency hearing" and even then only if the agency decision is not subject to *de novo* court review, 5 U. S. C. § 554—is inapplicable to Board decisions. The Freedom of Information Act imposes no independent obligation on agencies to write opinions. It simply requires them to disclose the opinions which they do write. *NLRB* v. *Sears, Roebuck & Co., ante*, p. —. If the public interest suffers by reason of the failure of the Board to explain some of its decisions, the remedy is for Congress to require it to do so. It is not for us to require disclosure of documents, under the purported authority of the Act, which are not final opinions, which do not accurately set forth the reasons for the Board's decisions, and the disclosure of which would impinge on the Board's predecisional processes.

The judgment of the Court of Appeals is

Reversed.

MR. JUSTICE DOUGLAS dissents.

MR. JUSTICE POWELL took no part in the consideration or decision of this case.